FIRST PLATFORM

OF

INTERNATIONAL LAW.

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BY

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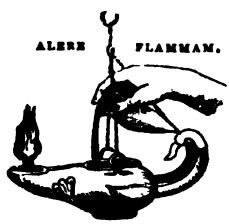
LONDON:
JOHN VAN VOORST, PATERNOSTER ROW.
MDCCCLXXVI.

PRINTED BY TAYLOR AND FRANCIS,
RED LION COURT, FLEET STREET.



RESPECTFULLY AND GRATEFULLY DEDICATED

BY

THE AUTHOR

TO

THE RIGHT HONOURABLE

THE EARL OF CARNARVON,

HER MAJESTY'S PRINCIPAL SECRETARY OF STATE FOR THE COLONIAL DEPARTMENT, &c.

PREFACE.

I BELIEVE that the title of this book accurately represents its design. It does not profess to be such a full and elaborate treatise on International Law, that the reader who has become familiar with its contents may consider himself master of the subject; but, on the other hand, I hope that it is something more than a mere preliminary sketch to be discarded by the advanced student. It is meant to supply a sound foundation and a duly arranged framework, to which much must be added from further materials and other architects, but which will facilitate the acquisition, the orderly grouping, the perception, the retention, and the right employment of continually increasing stores of knowledge. Above all, I earnestly hope that it will serve to teach principles. I follow President Woolsey in writing for all "who are cultivating themselves by the study of historical and political science," and who by that study are qualifying themselves to do their duty as members of a Free State which is itself a member of the great Commonwealth of Nations. "The actual law should be continually compared with the standard of Justice," and "brought into connexion with the advances of humanity and civilization."

This development of International Law in unison with the moral and intellectual advancement of mankind adds interest and dignity to the science; but it also imposes difficulty. A generous innovation on long-established usage, a high-handed rejection of cramping formalities may seem to be inspired by the eternal laws of justice and humanity; and yet the change, if not well timed and skilfully worked out, may create excessive injury and confusion. Most true is the remark of the ancient poet in his eulogy on the jurisprudence of the Æginetans, when their island was frequented by men of many nations, that "It is a difficult thing to dispense upright and accurate law, not unseasonably, on matters manifold in kind, and prone to many bearings:"—

Ὅ τι γὰρ πολὺ, καὶ πολλᾷ ῥέπει,
Ὀρθᾷ διακρίνειν φρενὶ, μὴ παρὰ καιρόν,
Δυσπαλές. PIND. Ol. VIII. 23.

It is here that we may prove the value of the rules of Utilitarianism, as now understood, not only in testing the essential justice of measures, but also in determining whether "Convenience and the Reason of the thing" favour their present adoption. There is no country in which these matters ought to be more studied than in England; for there is no country which can do more than England can now do and must do to influence the currents of International Law in many of its most important branches.

E. S. CREASY.

THE ATHENÆUM CLUB,
October 20, 1876.

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CHAPTER I.

Definitions. Distinction between Moral Law and Positive Law.

Definition of International Law.—Why term preferable to old term "Law of Nations."—Of Sovereign States.—Meaning of the word "Law."—Moral sense of word; forensic sense.—What is meant by "Moral Law;" what by "Positive Law."—Moral Law corresponds with St. Paul's Law of the Gentiles.—The *Jus Naturale* of the Stoics and Roman Jurists.—The *Jus Naturale* of Grotius.—Natural and Legal Obligations.—Meaning of phrase "Law of Imperfect Obligation."—Moral Rights and Legal Rights.—*Licita* not always *Honesta*. —*Jus* and *Lex*. — St. Thomas Aquinas's, Savigny's, and Lord Bacon's explanations of these words.—Expletory and Attributive Justice.

General description of "International Law."

1. International Law is the System of Moral Principles and Positive Rules by which the conduct of States, one towards another, is, or ought to be, determined*.

* The following definition is given by Wheaton in the French text of his treatise:—"Le Droit International, tel

Need of further definition. Clear Terminology indispensable for sound reasoning.

2. Besides giving this general description of our subject, it is useful at the very outset of our work to examine well the meaning of each of the two words of its title; and to consider separately, first, the word "International," and, secondly, the word "Law."

I enter on this task not out of any love for the laying down of Definitions, which is not only the most laborious of a writer's functions, but also the most perilous to his reputation*. I do so because distinctness of terminology is absolutely necessary for thinking distinctly, and for conveying distinct thoughts from one brain into another. It is useless, for instance, that two persons should try to reason together about "Law" and "Right," unless each person knows what is meant and understood by each when the words "Law" and "Right" are uttered. The

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qu'il est compris par les nations civilisées, est l'ensemble des règles de conduite que la raison déduit, comme étant conformes à la justice, de la nature de la société qui existe parmi les nations indépendantes, en y admittant toutefois les définitions ou modifications qui peuvent être établies par l'usage et le consentement general." (Éléments, tome i. p. 24.) Wheaton's own English version makes International Law consist of "those rules of conduct which reason deduces as consonant to justice from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." President Woolsey (International Law, p. 366, ed. 1874) cites this, and remarks:—"This definition removes the science from the nakedly positive ground, and gives full scope to comparisons between the existing law and the standard of Justice."

* The Roman Jurist Javolenus, as cited in the Digest, Liber 50. Tit. xvii. par. 202, gives this salutary warning:—"Omnis definitio in jure civili periculosa est; parum est enim ut non subverti possit."

student of a new branch of Jurisprudence has no more right to complain because he is required to begin by mastering a dry array of definitions, than the student of a new language has to grumble at the dulness of its initiatory grammar.

3. I therefore now address myself to the consideration of the term "International Law;" and I will take first the word "International." This word (for the introduction of which we are indebted to Jeremy Bentham*) has the great merit of announcing, not indistinctly, its own character; but still it is useful to point out what the peculiar merit of the word is, and why the phrase "International Law" is a much better phrase than the old term "Law of Nations," which Jurists before Bentham's time used to employ.

The word "International" self-explanatory.

4. The old phrase "Law of Nations," like its parent phrase the *Jus Gentium* of the Romans, has this mischievous ambiguity: it *may* mean (and it is sometimes used with the intention that it should mean) the laws, rights, and duties of Nations in their dealings with each other; but it also *may* mean (and is frequently used with the intention that it should mean) those general rules of Justice, and those legal rights and duties generally, which have been recognized and adopted by all, or nearly all, civilized nations.

Ambiguity of the old phrases "Law of Nations" and *Jus Gentium*. They may mean *Jus inter Gentes*; but also they may mean *Jus commune Gentibus*.

5. These meanings are not alien one from another; but they are far from being commensurate one with another. The first may be deemed to be included in the second; but the second is much more ample and

These meanings not discordant, but not coequal.

* See Bentham's 'Principles of Morals and Legislation,' chap. xix. sect. 25, note.

The *Jus inter Gentes* is part of the *Jus commune Gentibus*, but it is a special part; and the *Jus commune Gentibus* includes many other things.

more complex than the first. A system of laws, rights, and duties affecting nations in their dealings with each other (*Jus inter Gentes*) has formed, and is part of, the great body of general rules of Justice, and of general legal rights and duties, which I have spoken of as having been recognized and adopted by all, or nearly all, civilized nations (*Jus commune Gentibus*). But this last-mentioned body of general rules, rights, and duties bears upon a man's conduct relatively to his fellow-men in matters which concern members of his own nation only, as well as in those which are connected with the relations between his nation and other nations.

6 A. Consequently, although it would not be utterly inaccurate to give to our subject the title of "Law of Nations"* (meaning thereby that it is part of the general law of Nations), it is much better to employ a term which not only denotes what we mean, but cannot possibly be supposed to include any thing else. This we do when we use the term "International Law"†. It is then apparent, *ex vi termini*, that the Law, of which we are speaking, is what Austin speaks of as "*The Law obtaining between Nations; the Law which is conversant about the conduct of Independent Political Societies, considered as entire communities:*

Superior precision of the word "International." It is consonant with the definition given (a) by Austin;

* It would, however, be inaccurate to call it "*The* Law of Nations."

† It might be supposed, for reasons which will appear when we distinguish between Nations and States, that the term "Inter-Statal Law" would have been better still. But its harshness would probably have prevented its becoming popular, as the term "International" is.

circa negotia et causas gentium integrarum"*. Our topic is then self-limited to "*Jus illud, quod inter populos plures aut populorum rectores intercedit*" of Grotius †; to "*La Science du Droit, qui a lieu entre les nations ou états, et des obligations, qui répondent à ce droit*" of Vattel ‡.

(b) Grotius; (c) Vattel.

6 B. We must inspect yet a little more minutely the second part of the word "International;" and we must take care that we are not misled by the term "Nation," when we apply ourselves to "the Law which obtains among nations." Really and truly our business is with the Law which obtains between Independent Political Communities. Now, an Independent Political Community does not always consist of men of a single nation; neither is the whole of a nation always comprised in the same Political Community. The word "State" is the most convenient short term to employ, as conveying more expressly and accurately than any other one word the idea of the Independent Political Community, between which and the like of which International Law has its being and operation. Accordingly, nearly all the chief recent writers on the subject have adopted this term §. It cannot indeed be truly asserted that the word "State" has no plurality of meanings ‖. But it has

Further examination of term "International." Meaning of word "Nation."

Single Nations not always States; and a State not always the whole of a Nation.

Convenience of the word "State."

* See Austin's 'Jurisprudence,' vol. i. p. 231.

† Prolegomena, sect. 1.

‡ Préliminaires, sect. 3.

§ *E.g.* Kent, Story, Phillimore, Halleck, Lawrence (Commentaire sur Wheaton, vol. i. p. 155), who all point out the vagueness of the term "Nation."

‖ See a valuable note on them in Austin's 'Jurisprudence,' vol. i. p. 249; and see Lawrence, 'Commentaire,' vol. i. p. 161.

Meaning of word "State" in this treatise.

one chief meaning, which is well known and is commonly used,—that of an "Independent Political Community;" and it is always to be understood in that sense when used in this treatise, unless the context gives a clear warning that the word is specially employed with a different import.

"International" to be understood as "Inter-Statal."

7. It follows that the term "International Law" is to be understood as meaning the Law which obtains between States.

"State" means "Sovereign," *i.e.* "Independent State."

8. Some writers on International Law add the epithet "Sovereign" to the word "State" or "States." And the compound term "Sovereign State" has the advantage of at once giving a distinct monition that the denomination of "State" cannot be properly applied (so far as regards purposes of International Law) to any community which is compulsorily and habitually dependent, as to its dealings with other States, on the will of any other community, or on the will of any person not included among its own members. Without, however, the constant prefix of the epithet "Sovereign," it may be generally understood that the States of which we speak are Independent States.

Cautions as to use of word "Sovereign."

9. It is indeed well to take heed, when the epithet "Sovereign" is used, that the word does not mislead us into fancying that any particular form of government is necessary to give to a community the character of a State for International purposes. There are two principles of International Law, which will be explained presently, but which may be usefully mentioned in this place. The first is that it *is* necessary

that a Community shall, in order to be recognized as a State, have its own organized government. The second is that the form of such government is, in an International point of view, absolutely immaterial*.

* Austin, vol. i. p. 249, says as to the word "Sovereign":—

"The term 'Sovereign,' or '*The* Sovereign,' applies to a sovereign body as well as to a sovereign individual. 'Il sovrano' and 'le souverain' are used by Italian and French writers with this generic and commodious meaning. I say *commodious*; for supreme government, abstracted from form, is frequently a subject of discourse. 'Die *Obrig*keit' (the person or body *over* the community) is also applied indifferently, by German writers, to a sovereign individual or a sovereign number; though it not unfrequently signifies the aggregate of the political superiors, who, in capacities supreme and subordinate govern the given society. But, though 'Sovereign' is a generic name for sovereign individuals and bodies, it is not unfrequently used as if it were appropriate to the former; as if it were synonymous with 'monarch' in the proper acceptation of the term. 'Sovereign,' as well as 'monarch,' is also often misapplied to the foremost individual member of a so-called limited monarchy. Our own King, for example, is neither 'sovereign' nor 'monarch:' but, this notwithstanding, he hardly is mentioned oftener by his appropriate title of 'King,' than by those inappropriate and affected names."

Wheaton (Élém. t. i. p. 31) divides State-sovereignty into internal and external sovereignty, the latter alone coming within the purview of International Law. "La souveraineté est le pouvoir suprême qui régit un État quelconque, soit monarchique, soit républicain, soit mixte. Ce pouvoir suprême peut être exercé ou à l'intérieur ou à l'extérieur du territoire de l'État.

"La souveraineté intérieure est celle qui appartient à la nation, ou celle qui a été conférée par elle à son gouvernement d'après les lois fondamentales de l'État. C'est l'objet de ce qu'on appelle 'le droit public interne,' ou plus proprement 'droit Constitutionnel.'

"La souveraineté extérieure est l'indépendance d'une société politique à l'égard de toutes les autres sociétés politiques. C'est par l'exercice de cette souveraineté que les relations internationales d'une société

Meaning of word "Law." Its importance and many-sidedness.

10 A. We have hitherto been considering the meaning and the ideas properly connected with the word "International." We have now to examine the ideas properly connected with the word "Law."

There are few words in the English language of such manifold and grave significance as is syllabled in these three letters.

Hooker's description adverted to.

10 B. Our old English divine, Hooker, in a well-known passage in the first book of his 'Ecclesiastical Polity,' has eloquently and beautifully described the various meanings of the word "Law"*. To quote and discuss his description (which some late writers have rather hastily and petulantly censured) would occupy too much space in this volume. I prefer to take a definition from Hooker's great contemporary, Sir Walter Raleigh†. Remarking how diversely the word "Law" is used, Raleigh says of it, that "if we consider it at large, it may be understood for any rule prescribing a necessary mean, order, and method for attaining an end. And the rules of grammar or of other arts are called *laws*. So all ordinances, whether good or evil, are called by the name of *laws*. The word 'Law' is also taken for the moral habit of our mind, which doth (as it were) command our thoughts, words, and actions, framing and fashioning them according to itself, as to their passage and platform." But, he

Raleigh cited.

politique sont maintenues en paix et en guerre avec les autres sociétés politiques. Le droit, qui la règle, a été appelé droit public externe, ou plus proprement, droit international."

* Ecclesiastical Polity, book i. sects. 1–8 inclusive.

† History of the World, part 1. book 2. ch. iv. I have not transcribed the whole passage.

afterwards adds, "Law, commonly and properly, is taken for a right rule prescribing a necessary mean for the good of a Commonwealth or civil Community." In another section of the same chapter, Raleigh discourses of the Laws eternal almost as eloquently as Hooker; and he gives an elaborate diagram (which is well worth consulting) of "those sorts of laws from whence all other particulars are drawn."

Other meanings of the word "Law."

11. In addition to the meanings of the word "Law" which have been cited, the following also are not unfrequent*. The rules set by private societies, whether firms, clubs, or of any other kind, for the guidance of their members and the ordering of their affairs, are commonly called the laws of the club, of the firm, or of the like. The rules of sports and games are frequently called their laws. Some writers draw attention also to the usage of the word with reference to the general uniformities of phenomena which we observe in Nature†. Such expressions as "the Law of gravitation," "the Laws of motion," "the Laws of arithmetic," and the like, are pointed out as the most violently metaphorical usages of the word "Law." We may at once disembarrass ourselves from any further consideration of the word when used in these last-mentioned senses, and also in some others, already mentioned, which have little or no practical bearing on our subject. We have no cause to consider here any of the laws imposed by the Divine Creator on any part of the creation, except

Meanings which require no further notice.

* See Austin, Lecture 5.

† See the Duke of Argyll's "Reign of Law."

upon Man. Nor need reference be made to that part of the eternal Law, which Hooker supposes the Almighty to have set down with regard to Himself, for Himself to do all things by. It would also be superfluous to discuss those usages of the word by which it is made to denote a habit, or a tendency. And after having once noticed that it is often employed with reference to the regulations which men make for themselves in their minor associations for business or sport, we may waive further discussion as to that usage of the term.

After these limitations, general meaning of the word "Law."

12. Even with these limitations, the word "Law" as applied to Man, to his rights and duties, is a word that has been used in many senses; but throughout these usages of the word there may be observed one great line of distinction. In one class of meanings, "Law" comprises general doctrines of right and wrong, and of man's general duties towards his Creator and towards his neighbour; whereas in another class of meanings "Law" is narrowed towards the precise sense of a definite imperative rule of conduct prescribed by a political superior, who has the power and the will to enforce by practical means the observance of such rules. The difference is substantial; and though we may not care to discriminate between nice shades of similar ideas, or to refine upon the comparative anatomy of metaphors, it is right that, when we profess to discuss International Law, we should anticipate the question whether we use the word "Law" in its ampler or in its narrower but more determinate signification. We may shortly term

The broad moral sense of the word "Law."

The narrow forensic sense.

Law in the ampler sense "Moral Law." In its stricter sense it is generally called "Positive Law," a term which will be explained presently.

13. A complete system of International Law comprises Laws of both these classes*. There are International Moral Laws, and there are International Positive Laws. But the distinction between them is to be carefully observed and remembered.

What is meant by "Moral Law."

14 A. Moral Law means a principle, a rule of Justice, a standard of conduct, which, if we observe it in questions between ourselves and others, will ensure for us the approval of our consciences, and respecting which we can demonstrate that its observance will promote the greatest possible happiness in reasonable degree of all who are affected by such observance. Our motive (independently of Religion) for obeying Moral Laws is our conscientious sense that it is our duty to do so. This sense of duty is blended with a reasoned belief that these Moral Laws are good in themselves, and that they work general good, as already explained. We do not observe them *formidine pœnæ*. We have at least no expectation that our breach or neglect of them will be followed by physical evil, inflicted on us by any human superior.

* Mr. Nassau Senior, in his very valuable paper on "The Law of Nations," published in the 'Edinburgh Review' (April, 1843, no. clvi. vol. lxxvii. p. 304), applies the term "International Morality" to the first class of these Laws; and treats the phrase "International Law" as applying to the last class of laws only. But he considers that both International Morality and International Law are parts of the "Law of Nations"—the old inconvenient phrase, which he, almost alone of recent writers on the subject, persists in employing.

A Rule of conduct having this last-mentioned incident (namely, a liability on the part of those who break it, to be physically punished by a human superior) would cease to be mere Moral Law, and would be Law of the class of "Positive" or "Instituted" Law, to the consideration of which class the greater part of this treatise will be devoted.

When Moral Law becomes Positive Law.

Moral Law corresponds with the law of the Gentiles, spoken of by St. Paul;

14 B. Moral Law is the same as that universal law, independently of revealed religion, which St. Paul speaks of, "written in the hearts of men," by which the Gentiles had the power of being "a law to themselves"*. It is also equivalent to the *Naturalis Ratio*, the *Lex Naturæ*, and the *Jus Naturale*, as generally meant by the Stoic philosophers and the Roman Jurists †.

* Epistle to the Romans, chap. ii. vv. 14 & 15, and chap. i. v. 19. The great Jurist, Donellus, refers to these verses of this epistle, when commenting on the passage of Gaius, 1 Inst. 1 (embodied in Justinian's Institutes, lib. 1. tit. 2. § 1, and in the Digest, lib. 1. tit. 1. § 9). "Quod *Naturalis Ratio* inter omnes homines constituit, id apud omnes peræque custoditur, vocaturque Jus Gentium —quasi quo jure omnes gentes utantur." Donellus teaches that the *Naturalis Ratio* of which Gaius speaks, is the Law of God, written, as St. Paul says, in our hearts, and that this is evident from the mere fact that all men bear witness to this law; "for, when they offend against it themselves, their conscience accuses them, and they always condemn others so offending, and hold them to deserve punishment. It would indeed be absurd to say that, whereas the Creator gave us reason, and a sense of right and wrong requiring of us the performance of certain duties towards Himself and to our fellow men, yet we are unable to perceive those duties by the use of that reason." See Bowyer's Commentaries on Public Law, p. 32.

† See Donellus, as cited in the last note.

According to the Stoics, Man is bound to live according to the noblest part of his nature—that, is Reason. Man, as the

The great Jurists of the 17th century, who founded the modern science of International Law, fully recog-

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only animal endowed with reason, is bound to govern himself according to the dictates of Right Reason, the same Right Reason by which Nature, that is, the whole orderly system of the Universe (κόσμος), moral and intellectual, as well as material and sensual, is governed. The Roman Jurists in Cicero's age and afterwards, especially in the times of the Antonines (which formed the golden age of Roman Jurisprudence) taught that principles of truth and equity are discernible (though more or less mixed up with baser elements) in the laws of all nations, and that these make up a law common to all Nations (*Jus Gentium*), and that they are in reality the fragments of a lost Law of Nature, which once existed in a perfect form, and which the Legislature and the Judge should strive to restore, not by hasty and violent subversions of their country's municipal laws, but by making this ideal type of excellence the model after which all prudent and practicable reforms should be fashioned, and by calling in its spirit to guide them wherever they had to interpret doubtful matters or to provide for new emergencies. See this subject admirably explained in Sir Henry Maine's 'Ancient Law.' A student may also consult with advantage Ortolan's 'History of the Roman Law.' In order to guard against misrepresentation, I wish to state that I intentionally exclude the supposed archaic kind of *Jus Naturale* specified by Ulpian in a definition "which has passed into the Institutes of Justinian without, however, influencing Roman Law. To them [*i. e.* to Ulpian and his followers], *Jus Naturale* is that in which men and animals agree, the law stamped on free animate beings. Savigny (System des heut. röm. Rechts, i. 415) thus explains their views :—'There was a time, we may conceive, when men acknowledged only those relations which are common to man and beast, when they followed natural affections and impulses in all freedom; this was the reign of Jus Naturale.'" President Woolsey, in his 'International Law,' cites this passage from Savigny. But as no such state of things ever existed, the Ulpianic hypothesis may be dismissed as one on which no sound argument can possibly be built.

A similar remark applies to the utterly visionary hypothesis

and with the *Jus Naturale* of the Stoics and the best Roman Jurists.

nized this Moral Law, this *Jus Naturale*. Grotius gives the following definition of it. "Natural Law is the dictate of right reason indicating that any act, from its agreement or disagreement with the rational nature of man, has in it a moral turpitude or a moral congruity and propriety, and consequently that such act is forbidden or commanded by God, the author of Nature"*.

Jus Naturale, as described by Grotius.

Summary of difference between Moral and Positive Law.

15. Ortolan has well summed up the difference between Moral Law and Positive Law, by saying that the standpoint of Moral Law is Reason, whereas the standpoint of Positive Law is Power†. It will be remembered that Positive Law is Law the breach of which is punishable by a human superior. There are

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of men having once lived in "a state of Nature," *i.e.* in absolute independence of each other, and owning no superior but God. Grotius in some parts of his work treats *Jus Naturale* as the law which alone these "noble savages" acknowledged; and he draws, or attempts to draw, analogies from it as to the *Jus Naturale* between Commonwealths. But I think (though in opposition to the opinion of Mr. Wheaton, as expressed by him in his 'Éléments du Droit International') that the reasonings of Grotius are in general consonant with his definition of *Jus Naturale* which is cited in the text. The Jurists commonly speak of *Jus Naturale* and *Jus Gentium* as identical; but they sometimes draw a distinction between them. The distinction to be recognized between *Jus Gentium* and *Jus Naturale*, is caused by the admixture of baser elements with the fragments of the lost perfect Law of Nature.

* "Jus naturale est dictatum rectæ rationis indicans actui alicui ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturæ Deo talem actum aut vetari aut præcipi."—Grotius, *De Jure Belli*, lib. i. xi.

† Ortolan's History of the Roman Law, Pritchard and Nasmith's translation, p. 563, n.

some other pairs of phrases with a similar contra-distinction between their terms respectively. Thus we hear of "Natural Obligations" and of "Legal Obligations," or, as the last are sometimes called, "Civil Obligations." To be under a Natural Obligation to do or to abstain from doing any act means that Moral Law or Natural Law requires such conduct from us; but it does not mean that a Positive Law has ordained any penalty to be suffered by us if we conduct ourselves differently. Hence Moral Laws and Natural Laws are frequently termed "Laws of Imperfect Obligation," a phrase which we must be careful not to misunderstand. The term "Imperfect Obligation" ought not to give the idea of a chain, some of the links of which are defective, and which therefore does not bind completely. The idea which it ought to give is the idea of a chain complete in itself, and morally binding*; but still it gives the idea of a chain not physically coercive. Its bonds are bonds which an unconscientious man may break without fear of punishment by the law of the land; and they are bonds which an unconscientious State may break without fear of war being declared against it for such breach.

"Natural Obligation" and "Legal Obligation."

16. Another pair of antagonistic phrases will be found in the terms "Moral Rights" and "Legal Rights." "Moral Right" is our claim to have that

"Moral Right" and "Legal Right."

* Lord Chancellor Selborne, in his judgment in Halliday v. Tamplin (a case to be again referred to presently), speaks of "those things which are called by Moralists 'Imperfect Obligations,' things attended to by right-minded, honourable, generous men, who do not measure every thing by money and the mere letter of the law."

done or left undone to us by other men, which Moral Law (or Natural "Law") requires or forbids. But in order to induce them to behave thus towards us we only rely on their Moral sense, or on our being able to convince them that they should behave thus on the principles of true Utilitarianism*. If there is any Positive Law, which sanctions our claim by imposing punishment on those who controvert that claim, our claim becomes a Legal Right, and ceases to be a mere Moral Right. I say it ceases to be a *mere* Moral Right, because in the great majority of cases, where Positive Law confirms Moral Law, a good man will respect the claims of his fellow-men on account of his own moral principles, *Virtutis amore*, and not because he is afraid of being punished by the strong arm of the Law if he acts otherwise. Generally speaking, where there is a Legal Right there is a Moral Right coexistent with it; but this is not always the case; nay, Legal Right and Moral Right may at times be at variance. Even without absolute variance the Positive Law of the land will often allow a man to do and to exact things which it is morally wrong for him to do or to require†. The great Roman Jurists took care to point this out. They have laid down as the primary maxim of Justice, that a man ought to live *Honeste*‡.

Non Omne Licitum Honestum.

* This will be explained in the next chapter.

† The late Chief Baron Pollock used to say that "Human Life would be unendurable if all men were to insist on their full Legal Rights."

‡ Juris Præcepta sunt hæc: "honeste vivere," &c. Inst. lib. 1. tit. 1. § 3. Digest, lib. 1. tit. 1. 10. sec. 1. Some remarks on the full meaning of the word *Honestum* will be found a little further on.

They also warn us that because a thing is not forbidden by the law, it is not necessarily therefore *Honestum*. "*Non omne, quod licet, honestum est*"*.

17. There is another pair of words to which, as distinguishable one from the other, it is necessary to draw attention. These are the two Latin words *Jus* and *Lex*, which are frequently employed by mediæval and modern Publicists, as well as by the old classical Jurists. The poverty of the English language in apt terms of Jurisprudence does not allow us to express, by any single English word, the ideas which the word *Jus* properly conveys when it is used in the very important sense which we have now to deal with. We can, however, Anglicize it in that sense sufficiently well for most purposes (though not with perfect accuracy), by calling it "Moral Law"†. *Jus* and *Lex*.

* Digest, lib. 50. tit. 17. sect. 144; see also sect. 197 of same title.

I have not entered into the distinction between "Sanctioned" and "Sanctioning" Rights, or into the various meanings of the Substantive "*right*" and the Adjective "*right*." They are important matters; but I have omitted them from a wish not to load this chapter with more discussions on definitions than are absolutely necessary. The student will find valuable information on these subjects in Austin's 'Jurisprudence,' vol. i. p. 44, and vol. ii. p. 787, and in Poste's Gaius, pp. 5–9, 132 *et seq.*

† Sir George Bowyer, at p. 30 of his work on Public Law, says truly of this word *Jus*:—"We come now to a part of our subject in which the difficulty arises that our language does not contain any word answering to the Latin word *Jus*, as contradistinguished from *Lex*. That distinction is, however, quite necessary for comprehending the civilians and Jurists."

Lieber, in his work on Civil Liberty and Self-Government, and in that on Political Ethics,

On the other hand, *Lex*, in the sense in which it is specially contrasted with *Jus*, is translatable, if here again we are allowed the use of a noun with an epithet to explain that which is expressed by a

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uses the adjective "Jural." He points out the difference between the "Jural" and "Legal" rights and relations at p. 160 of his work on Political Ethics. Whewell, in his translation of Grotius, uses the word "Jural." See also Bentham's note to the 23rd section of chap. xix. of 'Principles of Morals and Legislation.'

When I originally wrote this treatise, I ventured on coining the compound words "*Jus-Law*" and "*Lex-Law*," as pointing out the distinction in question. The phraseology would have been very convenient, especially if, when dealing with the peculiar part of "*Jus-Law*" which assumes its special character from the "Comity of Nations," I had been allowed to use the term "*Mos-Law*." Indeed "*Jus-Law*," "*Lex-Law*," and "*Mos-Law*" would have admirably summarized the whole subject. I, however, discarded my new compounds, partly from knowing the generally just dislike with which attempts to introduce new-fangled words are regarded, and partly because the main word *Jus* is used by Jurists and civilians in many other senses besides that of "Moral Law," to which I wanted to confine it. See Warnkœnig's list of the meanings of *Jus* in Roman Law at page 1 of his 'Institutiones Juris Romani;' and see Mr. Nassau Senior's remarks on the meanings of the word *Jus* in vol. lxxvii. of the Edinburgh Review, p. 314.

The great distinction between *Jus* and *Lex* is tersely and clearly stated by Mr. Monro in his note on the 1144th line of the 1st book of Lucretius:—"Juraque constituere ut vellent legibus uti." Mr. Monro remarks:—"*Jus* has a wider meaning than *Lex*, and includes all which is, *or ought to be*, legally right."

Professor John Grote, in his work on Modern Utilitarianism, p. 167, observes that "The notion of 'a system of Law which ought to exist' is a very good expression for what, in fact, is the Roman-Stoic or Philosophico-Juristic notion of *Jus*,—that ideal law so loftily described by Cicero, and after him by Hooker."

noun sole in the original, and to say that, as contradistinguished from *Jus*, *Lex* means "Positive Law."

Illustrations of the distinction between *Jus* and *Lex*.

18. I can best illustrate what I have said about *Jus* and *Lex* by quoting a few passages from writers of authority, in which those words are used in the meanings, respectively, of "Moral Law" and "Positive Law."

St. Thomas Aquinas on *Jus*.

St. Thomas Aquinas, as quoted by Sir George Bowyer*, says, "*Jus non est Lex, sed potius id quod lege prescribitur seu mensuratur.*" He means that a *Lex* (Positive Law) is some "portion of *Jus* (Moral Law), which a superior prescribes to those subject to him, and which he compels them to observe. The passage is not, however, to be understood as implying that Positive Law is wholly made up of portions of Moral Law. The Rules of Positive Law are apt to contain a mixture of foreign elements."

Savigny on *Jus*.

This is well illustrated by a passage in Savigny, the substance of which (following Bowyer*) I quote, because it illustrates the distinction between *Jus* and *Lex*. "The rules of Positive Law may spring from *Jus* or *Æquitas*; or they may spring from something foreign to Jurisprudence. These foreign elements, which introduce themselves into the law, sometimes produce results *contra rationem juris*. This Savigny names *anomalous law*, as contradistinguished from that proceeding out of *Jus*, which he calls *normal law*, and which the Romans sometimes desig-

* Public Law, p. 123. His reference to Savigny is to 'Traité du Droit Rom.' tom. i. ch. ii. pp. 58, 59.

nate as *Jus commune* [i.e. as *Jus naturale*]. The *Anomal law* is described thus by Paulus under the name of *Jus singulare. Jus singulare est quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est"**.

I will finally cite one more authority, which many English readers will probably regard more than the preceding.

Lord Bacon on *Jus* and *Lex*.

Lord Bacon says that the principles of *Jus* (Moral Law) are the general dictates of Reason—and that it is their function to permeate all the various matters of *Lex* (Positive Law), and to form a jural substratum on which every *Lex* (Positive Law) may rest. "*Regulæ Juris sunt dictamina generalia rationis, quæ per materias Legis diversas percurrunt, et sunt tanquam suburra Juris"*†.

Expletory Justice and Attributive Justice.

19. I do not think it necessary to do more than advert briefly to the phrases "Expletory Justice" and "Attributive Justice." They are expressions now seldom used; but they are occasionally met with; and as the distinction implied by them is sanctioned by high authority, they must not be altogether omitted. One of the latest English Jurists who has used the phrase, Mr. Best, thus explains them‡. "By *Expletory* [called by Mr. Best '*expletive*'] Justice, is meant that whereby we discharge to another duties, to which he is entitled by virtue of a perfect and rigorous obligation, the performance of which, if with-

* Digest, lib. 1. tit. 3. sect. 16.

† Bacon's Works, v. i. p. 822. Ellis and Spedding's edition.

‡ Principles of the Law of Evidence, p. 33.

held, he has a right to exact by force. The latter [*i.e.* Attributive Justice] consists in the discharge of duties arising out of an imperfect or non-rigorous obligation, the performance of which cannot be so exacted, but is left to each person's honour and conscience. These are comprehended under the appellations of 'humanity, charity, benevolence, &c.'" This is chiefly taken from Burlamaqui, whom Mr. Best refers to*.

To adopt some of the phraseology which has been already explained in this chapter, we might say that Expletory Justice administers nothing beyond "Positive Law," strict *Lex*, and legal rights and legal obligations; whereas Attributive Justice would administer also "Natural Law," Law of "Imperfect Obligations," *Jus* in its amplest sense, and would deal with moral rights and moral obligations.

* Burlamaqui, Principles of Natural Law,' part 1. ch. xi. sect. 11. The passage in which Grotius speaks of this part of his subject is in Book 1. lib. 1. c. i. sect. .

CHAPTER II.

On Moral International Law.

Moral Law an integral part of International Law.—A State is a Moral Agent.—Universality of this Law.—Jural Moral Principles.—Utilitarian Principle: its value as a test of Reasoned Truth.—Montesquieu's Rule.—Its Pacific Branch.—Comity of Nations.—Close Connexion between Moral and Positive International Law.—Vattel's Exposition of Montesquieu.—The Three Ulpianic Præcepts.—Bowyer's and Savigny's Comments on them,—"Pactum Serva:" importance of this Rule as to Treaties.—Senior's Demonstration of its Utility.—Recent Proofs of this.—Extent of this Maxim's Applicability.—Maxim that "A Wrong to one State is a Wrong to all, which all should join in redressing."

Moral Law an Integral Part of Jurisprudence.

20. Having endeavoured to explain what "Moral Law" (*Jus Naturale*) is, I will cite some reasons and authorities for believing that it forms an integral portion of International Law. It is the more important to do this, because some modern writers draw very sharply the line between "Morals" and "Law," and maintain that Positive Law only falls within the proper province of jurisprudence.

All Jurisprudence recognizes the defence that a contract is *contra bonos mores*.

21. A sufficient refutation of this dogma is found in the fact, that the laws of every civilized nation recognize Moral Law, and require their tribunals to discuss questions of morality. A valid defence may always be made to a claim founded on contract by showing that the performance of the agreement in question

was or would be *contra bonos mores**. So, too, Courts of Equity, when called on to set aside deeds and other proceedings, because the execution of such deeds or the taking of such proceedings was not directed by strict Positive Law, will examine carefully whether the defendants were acting on morally just grounds and through honourable feelings; and the Courts will uphold transactions in which the parties were thus guided by Moral Law, by *Jus Naturale*, by Imperfect Obligations"†.

Courts of Equity expressly recognize "Laws of imperfect Obligation."

22. Assuming, then, that Moral Law forms a true portion of Jurisprudence as between individual men, we shall be prepared to regard Moral Law as forming a true part of Jurisprudence between States, if we bear in mind that "a State is a Moral Agent." This

* This applies to conditions imposed by Testamentary direction, as well as to those which it is sought to create by compacts. The great Roman lawyers declared that all acts of crime or turpitude, "whatever outraged piety or a man's good fame, or his sense of self-respect, ought to be regarded as impossible"—that is, impossible to a reasonable and virtuous man. "Nam quæ facta lædunt pietatem, existimationem, verecundiam nostram, et (ut generaliter dicam) contra bonos mores sunt, nec facere nos posse credendum est." Digest, book 28. tit. vii. l. 15.

† See the words of Lord Chancellor Selborne in Halliday *v.* Tamplin, already cited in note to p. 15, *supra*.

In the Roman Jurisprudence *Naturales Obligationes* were frequently subjects of practical importance before the Tribunals. The extent to which they were recognized is thus stated by Warnkœnig (Institutiones Juris Romani Privati, sect. 758). "Naturalis Obligatio à civili in eo solummodo differt, quòd actionem non parit: in reliquis eandem habet vim et potestatem, quam et civiles obligationes habent. Ad compensandum et ad novandum prodest: pignus et fide-jussio in ejus securitatem dari potest, et quæ sunt reliqua obligationum effecta."

maxim has been contradicted by some writers; but if we believe that man is a moral agent, and if we consider how a State is composed, it must surely be evident to us that a State is a body politic with moral rights and moral responsibilities. The human beings, who make up the Community which (under certain conditions already pointed out) constitutes a State, are, each and all of them, individual beings with moral rights and obligations. Moral duty is an attribute of human nature. Men, by combining into a State, cannot get rid of the attribute of moral duty, any more than they can by combining into a political club, or a commercial partnership. The sphere of operation for morality may be enlarged; but this cannot destroy the principle. However small or however large the population of a State may be, it is a human aggregate of morally responsible beings; and when such beings are made up into a State, the attribute of moral right and moral responsibility applies to the joint entity and joint action of the human aggregate, as fully as to the single entity and single action of each human particle. This great truth is of incalculable importance to the International Jurist. If we thoroughly weld it into our minds, it matters little how we phrase it: whether, with Vattel*, we say of the State that "*elle est une personne morale qui a son entendement et sa volonté propre, et qui est capable d'obligations et de droits*;" or with Bowyer†, after Burlamaqui and Ballinger, that "*States acquire a legal personality*;" or with De Garden, that "*les*

It is an aggregate of moral agents; and the process of aggregation cannot destroy the attributes of moral right and moral responsibility.

Vatte. s words on this great subject.

Bowyer's, Burlamaqui's and Ballinger's.

De Garden's.

* Vattel, Prélim. sect. 2. † Bowyer, p. 125.

différents états, qui couvrent la surface du globe, sont des personnes morales, c'est à dire, des êtres raisonnables et libres comme les individus qui les composent"*; or with Lieber, that "the State is a jural society, and has likewise a moral character and must maintain it"†; or with Phillimore, that "independent communities are free moral agents, and are mutually recognized as such in the universal community [of States], whereof they are individual members"‡.

Lieber's.

Phillimore's.

23. I will cite one authority more, the great American Jurist, Chancellor Kent. I refer to him in this part of my subject the more gladly because the part of his 'Commentaries' which treats of International Law, is valued by statesmen and practical Jurists as much on account of the sober good sense as on account of the eminent abilities and far-reaching learning of the Commentator. Kent says, "The most useful and practical part of the Law of Nations is, no doubt, Instituted or Positive Law, founded on usage, consent, and agreement. But it would be improper to separate the Law entirely from Natural Jurisprudence, and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the Nature and Constitution of man, and the same sanction of Divine revelation as those from which the law of morality is deduced. There is a Natural and a Positive Law of Nations"§. "We ought not to sepa-

Chancellor Kent.

* De Garden, 'Histoire des Traités,' p. 2.

† Lieber, 'Political Ethics,' p. 167.

‡ Phillimore, vol. i. p. 9.

§ Vol. i. p. 2. Among very recent works of high authority on International Law, Blunt-

rate the science of Public Law from that of Ethics, nor encourage the dangerous suggestion that governments are not so strictly bound by the obligations of truth, justice, and humanity in relation to other powers, as they are in the management of their own local concerns. States or bodies politic are to be considered as moral persons having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. The Law of Nations is a complex system composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relations and conduct of nations, of a collection of usages, customs, and opinions, the growth of civilization and commerce, and of a code of conventional or positive law. *In the absence of these latter regulations the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations, and the nature of moral obligation*"*.

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schli's 'Le Droit International Codifié,' may be also referred to. He says (p. 2, Lardy's translation, last edit.), "Chaque Etat est un ensemble, une personnalité, un être qui a ses droits et une volonté tout comme les personnes physiques."

* Kent *ut suprà*. Bluntschli, in part of his late work on International Law (Droit International Codifié, Lardy's translation, ed. 1873, p. 62), says expressly, "Les Etats sont les personnes du droit international. La personnalité est une qualité nécessaire des états. Une personne, dans le sens

24. The "Moral Oligations," which Chancellor Kent here speaks of, apply to all States, and not merely to States which are composed of Christians. It follows that Moral International Law is as universal as humanity, at least wherever there is civilization enough for men to be organized into Political Communities*. Bishop Sanderson, our old English Divine and casuist, in his treatise on the Obligation of Conscience, distinguishes between, 1st, the *Lumen Innatum*—that is, man's natural sense of Right and Wrong; 2nd, the *Lumen Acquisitum*—that is, the additional test which man gains from observation and reason; and, 3rdly, the *Lumen Illatum* of Revealed Religion. Unquestionably this direct light from Heaven is the surest and holiest of all guides; and the influence of it over all, who call themselves Christians, ought to ensure for the moralities of International Law a more zealous recognition, and a more certain mutual enforcement among the States of Christendom in their dealings with each other, than can be looked for in international transactions wherein States not Christian are concerned. But it is an exaggeration and an error to assert, as some have

Universality of International Law.

It is an error to assert that Natural Law

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juridique du mot, est un être capable d'acquérir ou de faire valoir des droits, et de contracter des obligations. L'état réglant librement le droit sur son territoire est chez lui la personne par excellence. L'état, à mesure qu'il entre en relations avec d'autres états, acquiert la qualité de personne internationale."

* "Toutes les nations ont un droit des gens" (Lawrence, Commentaire sur Wheaton, tom. i. p. 99. "Le Droit International est indépendant de la religion" (Bluntschli, p. 17).

enough to found International Law cannot exist between us and heathen nations.

asserted, that there is no general valid International Law beyond Christendom, or that there was no general valid International Law in existence before the times of Christianity. These two propositions are involved one with another, and must stand or fall together. The question of their truth is no mere speculative question. It affects the dealings of nearly all the European States, and of the States founded by European settlers in America, with nearly all the nations of the rest of the world. It is preeminently a practical question for members of the British Empire, within the territories of which are comprised so many myriads of so many different faiths, and the manifold frontiers of which come into contact with countries of Mahometans, with countries of Buddhists, with countries where almost every known form of Paganism has its worshipping population.

Practical importance of this to Englishmen.

Proof of Natural Law without Revelation.

25. This is the proper place to consider this question, as, without proving the universality of Natural Law, we cannot show the universality of general International Law. The universality of Natural Law can be proved at once to the Christian by a reference to the Christian Apostle, who speaks of the Law of God written in the heart of the Gentiles, and of the witness which the human conscience bears to this Law*. And (independently of this proof from Holy writ) it is demonstrable from the general agreement of nations, in all ages and in all climes, as to the main rules of morality, as to which I would cite the eloquent

* Epistle to the Romans, ch. ii. ver. 15. See the Comments of Donellus on this, cited in Bowyer's 'Public Law,' p. 32.

and comprehensive words of Sir James Mackintosh, as transcribed by his son from his Manuscript Lectures on the Law of Nations:—"Morality admits no discoveries. I do not speak of the theory of Morals, but of the rule of life. Examine the codes of nations, those authentic depositories of the moral judgments of men, you everywhere find the same rules prescribed, the same duties imposed: even the boldest of those ingenious sceptics, who have attacked every other opinion, has spared the sacred and immutable simplicity of the rules of life. In our common duties, Bayle and Hume agree with Bossuet and Barrow. Such as the rule was at the first dawn of history, such it continues till the present day. Ages roll over mankind, mighty nations pass away like a shadow; virtue alone remains the same, immortal and unchangeable." Citation from Mackintosh.

26. Mackintosh here argues from the antiquity as well as from the ubiquity of the great general rules of Morality. Aristotle's Nicomachean Ethics, or Cicero's treatise *De Officiis*, could prove this antiquity sufficiently for the purpose of our present argument; that is to say, they could prove that even without Revealed Religion there has been, and is, a known Law of Natural Morality and Natural Religion, by means of which men have been, and are, and may be enabled to discern and cleave to that which is good, and to abhor and oppose that which is evil. Other proofs in support of this truth, from the classical and from other ancient writers, have been and may be brought forward in multitudinous force; but it is Antiquity of Natural Law,

proved especially from the Roman Jurists.

best evidenced by the writings which we possess of the Jurists of ancient Rome. Though many of those great men wrote after the Christian era, and though the chief compilations of their works were made under the directions of Christian Emperors, Roman Jurisprudence is essentially the product of ancient, of unconverted Rome. This fact is emphatically acknowledged by Dean Milman, in his recent 'History of Latin Christianity.' In the masterly account there given of the legislation of Justinian, he says that "within its civil domain it was still almost exclusively Roman. It might seem that Christianity could hardly penetrate into the solid and well-compacted body of Roman Law; or rather, the immutable principles of Justice had been so clearly discerned by the inflexible rectitude of the Roman mind, so sagaciously applied by the wisdom of her great lawyers, that Christianity was content to acquiesce in those statutes, which even she might, excepting in some respects, despair of rendering more equitable"*.

Roman Law the Jurisprudence of Heathen Rome.

27. This universal Moral Law supplies the general Principles of Right and Justice, which Chancellor Kent (in the passage already cited) speaks of as forming so important a part of the Law of Nations. It supplies us moreover with principles of interpretation, by which we may decipher the meaning which ought to be given to the numerous difficult passages of Positive Law. It imbues the Jurist with the spirit in which Positive Law should be studied. It shows the Legislator and the Statesman what ideals of

Practical importance of a knowledge of this Moral Law.

* Vol. i. p. 358.

excellence should be aimed at as models, when Positive Law is altered or supplemented. And the present is an age in which International Law has received, is receiving, and will receive much change and development. To quote the words of Professor Sheldon Amos, "Public International Law exhibits Law in the making; that is as undergoing the characteristic process of Transmutation from habitual Moral Practices into severely coercive rules. This process is, in every nation, slow, tentative, and uncertain, as well as intermittent and even occasionally retrograde. International Law supplies a vivid example, on the largest scale, of this progressive Development going on before our eyes"*. He afterwards well describes how International Law impresses on the Student of Jurisprudence the true dignity of his subject "when he is called upon to investigate what legal rules for the regulation of Ownership, Contract, Belligerency, and Neutrality (the persons concerned being Sovereign States) can be most conveniently adopted in view of the different systems of Law prevalent in the several States. The Jurist (to whom the Student betakes himself in treating so profound a question as this, involving as it does the life and welfare of countless numbers of persons) is found to be doing nothing more than exercising his ordinary craft. He is discovering Permanence and Universality in the midst of incessant Flux and Variety. He is enforcing the peremptory Dictates of a great Moral Unity in the midst of innumerable distracted Factions. He is

Positive International Law is in continual process of formation out of Moral Law.

* Systematic View of the Study of Jurisprudence, p. 504.

tempering the heated passions of men by recalling to their minds eternal principles of Moral Right and Justice, which no artificial Institutions can transform, nor accidents of War annihilate or obscure. He, whose habitual occupation it is to study the laws of every Nation with the view of determining what is common to all, is never so much at home as when called upon to legislate for all Nations in the name of Principles which no civilized nation can refuse to recognize. Thus International Law is the most serviceable, the most charming, and the most honourable of the pursuits to which the Judicial Student is imperatively urged"*.

Impossible to understand the formed Positive Law without knowing the ingredients, and the processes.

28. Now I venture to ask, how is it possible to study International Law, or any other part of Jurisprudence, without understanding and without constant reference to these "Eternal Principles of Moral Right and Justice" which are ever to be recalled to men's minds, and which, in the administrative as well as in the Legislative fashioning of International Law, are "undergoing the process of transmutation from habitual Moral Practices into severely coercive rules"? Austin had good reason for his censure of Grotius and other writers who perpetually blend together and confuse the Law as it is, with the Law as it ought to

Austin's censures on Grotius and others well-founded.

* The Science of Jurisprudence, p. 504. Professor Sheldon Amos, in his definition of "Jurisprudence" at the beginning of his work, peremptorily severs it from Morality. In this he may seem to be following his great predecessor at University College, John Austin. But the passages which I have just been quoting show a far better judgment as well as feeling on the subject.

be. But in order to avoid this mischief there is no need to mutilate the subject, and to fling away the noblest portion. There is no serious difficulty (though it may require some care and may cause some iteration) in pointing out that which has been hitherto received as the Positive practical law on the subject, and in pointing out separately that which seems likely to become the law, and which ought to become the law, and the spirit of which ought even now to interpret the letter of the actual law, wherever that letter requires interpretation. Bluntschli has carefully drawn this distinction in his recent 'Droit International Codifié;' and so has Mr. Dudley Field, in his very valuable 'Draft Outlines of an International Code.' It would be difficult to find more lucid works than these are, especially when we remember how complex is the subject.

The opposite extreme to be avoided.

29. But though we may see plainly that a consideration of Moral Law is an essential and practical part of the study of Jurisprudence, it would be needlessly wearisome to introduce an elaborate and lengthy treatise on Ethics, comprehending all the numerous branches of that very complicated subject, in a book which is intended to be a practical work on International Law. It is unnecessary to do much more than to recapitulate a few moral maxims, which have been recognized by Jurists of high authority, and which we may term "Jural"* as well as Moral Principles. But I consider it also to be very important to show

Only necessary to state a few Moral Principles which are recognized as Jural Principles.

* See note † at p. 17, *suprà*, as to the usage of the word "Jural."

that when we adopt and employ these maxims as principles of International Morality, we have a reason for doing so, which is stronger than the mere authority of the writers in whose pages they are found. This reason consists in the fact that these maxims are in accordance with the true principle of true Utilitarianism; that is to say, it is demonstrable that the observance of these maxims as general rules of conduct would be for the benefit of all whose interests are affected by such observance. I will explain presently why I, although a firm believer in man's innate moral sense and in man's intuitive discernment of Right and Wrong, recognize and adopt the Utilitarian theory for purposes of argument and exposition*. For the present I will only remark how desirable it is to establish, if possible, at the outset of our inquiries a test by which "Reasoned Truth"† can be ascertained. Utilitarianism supplies that test. It shows why International Law ought to exist. It decides the soundness or the unsoundness of each alleged maxim of International Morality. It teaches, moreover, why every Positive International Law should be respected so long as it exists; in what spirit it should be interpreted; and how, if change be desirable, it should be changed by processes of cancellation, variation, substitution, or addition.

They are in accordance with the Principles of true Utilitarianism.

Utilitarianism the best Test of "Reasoned Truth."

* Chapter III. is chiefly devoted to the consideration of the true Principle of Utilitarianism, and its proper applicability.

† "Reasoned Truth — an aggregate of matters believed or disbelieved after conscious process of examination gone through by the mind, and capable of being explained to others."—Grote's *Preface to Plato*, p. 5.

I shall apply this test to every portion of Positive, as well as of Moral International Law. My immediate duty now is to state certain Maxims which are to be considered as International Moral Principles.

30. Not proceeding according to the date of the writing, but according to the general importance of the rule, I will cite first the maxim which Montesquieu lays down as the foundation of International Law. "Nations ought to do each other as much good in peace, and as little harm in war, as possible, without injury to their own true interests"*. Montesquieu's maxim

31. The soundness of this principle, according to the Utilitarian Test, is self-evident. in accordance with Utilitarianism.

32. It is a very important Jural maxim in both its branches—in that which relates to the conduct of States towards each other in peace-time, and also in that which regards their conduct in time of warfare. This last branch will be more conveniently considered in a separate part of this work, which will treat of International laws and usages arising out of a state of war. For the present we will limit ourselves to the examination of so much of Montesquieu's rule as has reference to the duties of nations in time of peace; and even of this part much may best be reserved for distinct consideration in another chapter: I mean the regulations connected with what is technically called "the Comity of Nations"—that which I would The Pacific Branch of the Rule.

* "Le droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible sans nuire à leurs véritables intérêts."—*De l'Esprit des Lois*, l. 1. c. 3.

gladly be allowed to call the *Mos* of International Jurisprudence, as in some respects distinguishable from both its *Jus* and its *Lex**.

The Comities of International Law.

33. There is a set of courteous and convenient observances, usually followed in the conduct of States towards each other, too definite and often too minute and conventional to make it proper to call them moral principles. The violation or neglect of these is not considered sufficient in itself to justify war, though one State is by such violation or neglect often placed in an attitude of avowed ill-will and suspicion towards another State. These observances of courtesy and convenience are said to depend on what Jurists and Statesmen style the "Comity of Nations." It might be truly argued that respect to them is required by the rules of Moral Law, and especially by Montesquieu's canon. But it will be more convenient to discuss them when we are setting forth the present practical condition of Positive International Law. It may, however, be mentioned at once, that the main subjects of the Comity of Nations are as follows:—

Principal subjects of the Comity of Nations.

1st. The Recognition and Enforcement of each other's municipal Laws as to questions of Contract and Property.

2nd. The extradition of Criminals.

3rd. The reception and treatment of Foreign Vessels and their crews in certain cases.

4th. The admission and treatment of Foreigners as travellers, traders, or residents.

* See note † at p. 17, *suprà*.

5th. Certain Diplomatic matters, such as the privileges of Ambassadors.

6th. Certain immunities and honours accorded to Royal Foreign Visitors.

34. The requirements of International *Mos*, or Comity, differ very much in their relative degrees of importance. None have the sanction of Physical Force; for there is none the breach of which is held to make a *Casus Belli*. But violations of the more serious of them will, especially if persisted in, or often repeated, make War inevitable, inasmuch as jealous and incensed spirits will, under such circumstances, put the worst possible constructions on each other's acts, will refuse all explanation of their own, and will hardly fail to give or to find what will be thought, or, at least, will be called a legitimate pretext for open hostilities.

Varying importance of these subjects.

35. Indeed this last observation holds good to a considerable extent as to all the principles of Moral International Law; and it shows how imperfect a treatise on International Jurisprudence would be, if it excluded the Moral department.

36. I will now state Montesquieu's rule as explained by Vattel. "Every nation ought to contribute to the happiness and the perfection of other nations by all means in its power; but when a nation cannot contribute to the good of another nation without essential injury to itself, its obligation in that particular instance ceases, and it is to be considered an impossibility for the nation to render that service" *.

Vattel's exposition of Montesquieu's rule.

* Vattel, 'Préliminaires,' s8ct. 13, 14.

Most of the practical examples of the applicability of this rule, which are given by Vattel, will have to be considered when we come to discuss the "Comity of Nations." Vattel also mentions the moral duty of one nation to assist another when that other is suffering under famine, or flood, or pestilence, or other grievous physical calamity. But no nation is bound to do this if it thereby exposes itself to serious privation; and each State is to determine for itself whether the case be one requiring it to give assistance*.

The three Ulpianic Præcepts.

37. I will now recapitulate, as Primary Rules of International Moral Law, the three great maxims which are placed at the very commencement of the Institutes and of the Digest of Roman Law. The particular passage in which these præcepts are set forth, was taken from the writings of the Jurist Ulpian; and they are often referred to as the "Ulpianic Precepts." They are as follows:—"*Juris præscripta sunt hæc.* 1. *Honestè vivere.* 2. *Alterum non lædere.* 3. *Suum cuique reddere.*"

Bowyer's and Savigny's comments on them.

38. Sir George Bowyer, in his work on 'Universal Public Law,' says rightly that these Ulpianic præcepta are not mere rules of law, but general principles calculated to furnish categories of law. Of these three præcepta the first is (as Savigny has remarked) the first in essence; it is the most profound, and it contains the germs of the two others"†.

39. I have cited this precept in the original Latin only, *Honestè vivere.* It is impossible to express

* Vattel, lib. 2. ch. 1, sect. 5, 9; and see Halleck, p. 283.

† Universal Public Law, p. 27.

the meaning of these words in a single English sentence. *Vivere Honestè* means far more than to "live honestly." Certainly the *Honestum* comprehends the meaning of Honesty; and the individual or State that acts dishonestly acts *inhonestè*. But the *Honestum* is not limited to mere probity of the purse. In him who lives *honestè* there can be no meanness, no unseemliness. The beautiful description of the *Honestum* given by Cicero in the first book '*De Officiis*,' shows that he considered that quality to involve a love of Truth for Truth's sake, magnanimity, a sense of order, an appreciation of all intellectual beauty and social benevolence toward fellow men, as well as good faith and integrity. *Honestè vivere* is to possess and to practise the Καλοκαγαθίαν * of the Greek philosophers. And we may without irreverence compare it to that aptitude and affection for "whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report," which the Christian Apostle enjoined to his Philippian converts †.

First Precept, *Vivere Honestè*.

Meaning of *Honestum*.

40. Savigny, further commenting on the Ulpianic precepts, says that "*Honestè vivere* is the maintenance of the moral rectitude of the individual; *neminem lædere* is the observance due to other men, and *suum cuique tribuere* is the practical recognition of the rights vested in others."

Savigny's comments on the three.

To some persons these two last precepts have appeared to be tautologous; but they are not so.

* As to the word Καλοκαγαθίαν, see Hooker, book i. sect. 8.

† Philipp. iv. 8.

The precept *Alterum non lædere* forbids offences of commission; the maxim *suum cuique tribuere* prohibits wrongs of omission also.

41. A cardinal maxim of Justice in all its forms, whether between man and man, or between nation and nation, is the maxim "Keep Faith" (*Pactum serva*) *.

Pactum serva.

"The Foundation of Justice is Good Faith; that is to say, the keeping sincere adherence to our words and to our covenants" (*Fundamentum Justitiæ est Fides, id est dictorum conventorumque constantia et veritas*) †.

This the foundation of all Justice.

So says the ancient moralist; and one of our latest jurists has in no exaggerated terms denounced "the treaty-breaking State as the great enemy of nations, the disturber of their peace, the destroyer of their happiness, the obstacle to their progress" ‡. He says rightly that the maxim *Pacta sunt servanda* is the pervading maxim of International as it was of Roman Jurisprudence §.

42. I should have reserved this subject for an after part of this volume, when I shall have to speak in detail of Treaties and their incidents, if it were not that an opinion seems to be gaining ground that, although the breach of a Treaty is always a legitimate cause for war according to the received practical regulations of International Law, yet there is nothing morally wrong in such breach, if the State that breaks

Importance of strict observance of this rule as to Treaties.

* This maxim was inscribed on the tombstone of the greatest of English kings, Edward the First.

† Cicero de Off. lib. 1. 7.

‡ Phillimore, vol. ii. p. 57.

§ Ibid.

the Treaty has been unfairly and hardly bound by that Treaty. Thus Dr. Momsen, in his well-known 'History of Rome' (now largely studied in English as well as in German Universities), uses these words :—

Dicta to the contrary.

Momsen's.

"A great nation does not surrender what it possesses, except under the pressure of extreme necessity; all treaties which make concessions are acknowledgments of such a necessity, not moral obligations. Every people justly reckons it a point of honour to tear in pieces by force of arms treaties that are disgraceful" *.

Attempts to invalidate such treaties as obtained by Duresse.

43. Moreover the case of the defeated nation, which, in order to save itself from further calamity, concludes a disadvantageous treaty with its victorious enemies, has sometimes been assimilated to the case of the individual who has been induced by violence and threats of death to make a promise to and a covenant with robbers.

Senior's demonstration of the fallacy of such reasoning.

But Mr. Senior has well pointed out the difference between the obligation of treaties on States and the obligation of engagements on individuals; and he shows that the principle of general Utility determines the difference. "Agreements entered into by an individual while under duresse are void because it is for the welfare of society that they should be so. If they were binding, the timid would be constantly

Utilitarianism determines the difference.

* Momsen's History of Rome, vol. i. p. 403, Dickson's Translation. Two centuries ago Spinoza had avowed what Mackintosh terms "the absurd and detestable maxim" that States are not bound to observe their treaties longer than while the interest or danger which first formed the treaties continues." But this doctrine had, until lately, found few advocates in theory.

forced by threats or by violence into a surrender of their rights, and even into secrecy as to the oppression under which they were suffering.

"The notoriety that such engagements are void makes the attempt to extort them one of the rarest of human crimes. On the other hand, the welfare of society requires that the engagements entered into by a nation under duresse should be binding; for if they were not so, wars would terminate only by the utter subjugation and ruin of the weaker party.

"If the allies had believed [in 1815] that their treaties with France were waste paper, they must have destroyed her fortresses and partitioned her territory. They ventured to leave her powerful only because they thought they could rely on her engagements"*.

Recent proof of the soundness of Mr. Senior's opinion.

44. Mr. Senior wrote this in 1843. During the last three years his words have received a very remarkable illustration from the conduct pursued by victorious Prussia towards France in 1871. Inasmuch

* Ed. Rev. vol. lxxvii. p. 307. See also the dictum of Sir Samuel Romilly in the Parliamentary debate of Feb. 10, 1816; cited by General Halleck in p. 455 of his work: —"There would be an end of all faith among nations, if treaties were held not to be binding because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justness of the war but the nation itself." See also the references in 1 Phillimore, pp. 151, 154 to D'Agnesseau and Montesquieu; and the energetic sentences of Bynkershoell, which are there cited. Bluntschli says of this :—"Le fait que le vainqueur était beaucoup plus puissant que le vaincu, et l'inégalité des conditions de la lutte n'entraînent pas la nullité du traité."—*Le Droit International*, ed. 1874, p. 393.

as the Prussian statesmen no longer believe that treaties will be held binding, when France shall have recovered her strength, they *have* dismembered her. Lorraine and Alsace have been rent away; and the conquerors avow that they have done so in order to make their own success speedy and certain on the expected revival of the war by France.

Russian repudiation of the Crimean Treaty.

45. An instance of glaring contempt for the obligatory force of treaties was shown by Russia, when in 1871 she informed Europe that she no longer considered herself bound by the treaty of 1856, which debarred her ships of war from navigating the Euxine. At the instance of England the formality was gone through of a joint acknowledgment of the general principle that one party to a contract cannot nullify it without the consent of the other contracting parties; but Russia gained her end in shaking off the restrictions imposed in 1856. If the probability of this could have been foreseen, England and France would hardly have consented to grant peace to Russia without having crippled her power far more effectually and permanently.

Extent of this maxim's applicability.

46. It is also to be remembered that the maxim "Keep Faith" holds good in International Law not only with regard to the covenants inserted in formal treaties, and other solemn diplomatic conventions, but with regard to all promises expressed or implied. "The obligation of promises depends on the expectations which we knowingly and voluntarily excite"*.

* Paley's Moral Philosophy, book iii. part 1. ch. v. The same principle is stated in Mill's 'Utilitarianism,' p. 67,

A State which has habitually practised towards others the rules of the Comity of Nations, and which has availed itself of the benefit of those rules in its intercourse with others, would act perfidiously if it suddenly and without warning violated those rules, though not binding on it as Positive Laws *.

Principle that a serious wrong to one State is a wrong to all, which all should join in redressing. The Solonian maxim.

47. Finally, I would gladly copy, and extend to International Jurisprudence, the maxim which the old Athenian Lawgiver and Statesman pronounced as to the spirit of Administration by which effective Justice is most fully secured. "That Commonwealth is best administered, in which any wrongs, that are done to individuals, are resented and redressed by the other members of the community, as promptly and as vigorously, as if they themselves were personal sufferers" †. This applies to the great Commonwealth

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with the important warning that this obligation of justice "may be overruled by such conduct on the part of the person concerned as is deemed to absolve us from our obligation to him, and to constitute a *forfeiture* of the benefit which he has been led to expect." See also Austin's 'Jurisprudence,' vol. i. p. 456.

* See the passages from the judgment of the American Chief Justice Marshall in the case of "The Exchange" (7 Cranch, 135), cited by Chief Justice Cockburn in his judgment in the Geneva Arbitration, p. 151, Blue book:—"A nation would justly be considered as violating its faith, although that faith may not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world."

† See Plutarch's Life of Solon, sect. 18: — Ἐρωτηθεὶς ἥτις οἰκεῖται κάλλιστα τῶν πόλεων· Ἐκείνη, εἶπεν, ἐν ᾗ τῶν ἀδικουμένων οὐκ ἧττον οἱ μὴ ἀδικούμενοι προβάλλονται καὶ κολάζουσι τοὺς ἀδικοῦντας. This is cited with approbation by Grotius, book 1. ch. v. sect. 2.

of civilized States. If this feeling were utterly extinct, the phraseology of International Law would be idle

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Grotius speaks more explicitly in a subsequent passage on the right of every nation to join in forcibly repressing violations of International Law. Grotius says (lib. 2. c. xx. sect. 40) :—"Sciendum quoque est reges, et qui par regibus jus obtinent, jus habere pœnas poscendi non tantùm ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violant. Nam libertas humanæ societatis per pœnas consulendi quæ initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates resedit, non propriè quà aliis imperant, sed quà nemini parent. Nam subjectio aliis id jus abstulit. Imo tantum honestius est alienas injurias quàm suas vindicare, quanto in suis magis metuendum est nequis doloris sui sensu aut modum excedat, aut certè animum inficiat."

In the 40th section of the 25th chapter of the same book, when speaking of the causes which justify war in behalf of others, he says :—"Postrema latissimèque patens est hominum inter se conjunctio, quæ vel sola ad opem ferendam sufficit. *Homo in adjutorium mutuum generatus est*, ait Seneca." A little further on Grotius quotes Plato also: "Puniendum censet qui vim alteri illatam non arcet."

Grotius also quotes Cicero de Officiis, i. 7 :—"*Qui non defendit, nec obsistit, si potest, injuriæ, tam est in vitio, quam si parentes, aut patriam, aut socios deserat.*" Grotius rightly understands the words *si possit* as implying a limitation that the third party is not bound to interpose if interposition would involve grievous peril to himself.

On the right of every nation to join in forcibly repressing violations of International Law, see Vattel, 'Préliminaires,' sect. 22, entitled *Droit des Nations contre les infracteurs du droit des gens* :—"Les lois de la société naturelle sont d'une telle importance au salut de tous les Etats, que si l'on s'accoutumait à les fouler aux pieds, aucun peuple ne pourrait se flatter de se conserver et d'être tranquille chez lui . . . Donc toutes les Nations sont en droit de réprimer par la force celle qui viole ouvertement les lois de la société que la nature a établie entre elles, ou qui attaque directement le bien et le salut de cette société."

gibberish, and the world would be utterly abandoned to the cupidity and the violence of the selfish and the

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Again, he says in liv. ii. c. i. s. 4:—"Quand un Etat voisin est injustement attaqué par un ennemi puissant, qui menace l'opprimer, si vous pouvez le défendre sans vous exposer à un grand danger, il n'est pas douteux que vous ne deviez le faire. N'objectez point qu'il n'est pas permis à un Souverain d'exposer la vie de ses soldats pour le salut d'un étranger, avec qui il n'aura contracté aucune alliance défensive. Il peut lui-même se trouver dans le cas d'avoir besoin de secours; et par conséquent mettre en vigueur cet esprit d'assistance mutuelle c'est travailler au salut de sa propre Nation."

Again, Vattel in the 283rd paragraph of the 23rd chapter of his first book, says:—"Les Nations ont le plus grand intérêt à faire universellement respecter le droit des gens qui est la base de leur tranquillité. Si quelqu'un la foule ouvertement aux pieds, toutes peuvent *et doivent* s'élever contre lui; et en réunissant leurs forces pour châtier cet ennemi commun, elles s'acquitteront de leurs devoirs envers elles-mêmes et envers la société humaine dont elles sont membres."

Professor Sheldon Amos, in the part of his work on Jurisprudence which treats of Public International Law, carries very far the doctrine that it is the duty as well as the right of all States to join in repressing every attack on that law. He says (p. 411):—"If the Peace, and Prosperity, and the Moral Progress of the States of Europe are directly dependent upon the Growth and Maintenance of International Law, there can be no more atrocious offence than for a State consciously to break the minutest of the clearly ascertained rules of this system of law. This being so, it should not be left to the Individual State which is directly injured, and which may only too probably happen at the moment to be weak, unprepared, or disadvantageously situated, to punish the outrage. All the States that care for the maintenance of International Law should, severally or jointly, instantly denounce the act, and should take immediate measures for suspending public intercourse of every kind with the offending State in the event of reparation not being at once made, and of the act, if recurrent, being desisted from. The difficulty in the way of such decisive measures is, partly, the paucity of the rules of Inter-

strong. If this feeling were universal, or even if it were materially strengthened, the projects of compul-

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national Law that are so widely admitted and so clearly stated as to admit of a breach of them being simultaneously resented on all sides without delay, and partly, as has been already intimated, the want of genuine desire of all the leading States of Europe at the present time to support the existing orderly relations of the society of States. The thought rather is, on the occurrence of a flagrant breach of faith, or of a trespass on territory, or of an invasion of national security, as to what will be the immediate consequences to each particular State for good or evil of the act itself, and of the like ulterior consequences to which these may give rise. Instantly a sense of self-preservation turns all the national consciousness inwards instead of outwards; and, in the place of a noble competition to be the first to support European order, even at personal loss, there is a miserable bustling either to take part in a new war or else to edge out of any participation in it with as much saving of personal dignity as the unhappy circumstances permit." A little further on (p. 456) the Professor enumerates the moral causes of general peace, the growth of which may be reasonably hoped for. Among these he places "A general and determined resolution among all States to hold the breaking of a single clause in a treaty by any State as a crime deserving instant and condign punishment at the hands, not of the immediate sufferers alone but of all."

It will have been seen that this goes far beyond the maxims of Grotius and Vattel, who require the general interposition of civilized States against those who "*immaniter* violant jus naturæ aut gentium," against the nation which "s'accoutume à fouler aux pieds les lois de la société naturelle, qui attaque directement le bien et le salut de cette société." This limitation of the Solonian maxim, when applied to International Law, seems reasonable, and calculated to promote the interests of peace and of general utility. A powerful State which took up arms for every supposed wrong of every other community, would probably become the bully and the curse of the world. Some offences, though real, may be so slight, that the injured party may be allowed "renunciare juri pro se nato;" and the indirect *Jus* of the

sory arbitration (which we so often read of) would become realities instead of being sneered at as reveries, and warfare, with its calamities and its abominations, might be almost banished from the globe.

Commonwealth of nations may be permitted to slumber for the sake of peace and quietness.

Bluntschli and Heffter in their recent writings have given lists of the cases in which third States ought to take action against offenders. See Bluntschli, 'Le Droit International Codifié,' p. 267 (A.D. 1874); and Heffter, 'Le Droit International de l'Europe,' p. 203. Some of the cases included in these lists seem to me to be open to much objection.

CHAPTER III.

On Utilitarianism as a Test of International Law.

Utilitarianism the best test of Reasoned Truth.—Nature of the modern Utilitarianism of Mill, Grote, and Austin. — Such Utilitarianism coextensive with the *Honestum*.—Justice and Conscience recognized by it.—The Intuitive School requires some external arguable standard for testing each man's self-sprung ideas.—Danger otherwise of the Protagorean heresy "*Homo Mensura*."—The true *Utile* matter of argument.—Recognized as characteristic of the *Honestum* in International Law by Burlamaqui, Vattel, and Story.—Acts to be regarded as instances of Rules.—Utilitarianism proves the benefit of the existence of International Law, and guards against hasty changes.

48. I devote this chapter to setting forth the true principle of modern Utilitarianism, and to showing that such Utilitarianism is the best practical test and standard of "Reasoned Truth"*, in questions of International Law. I do not say that Utilitarianism is the fountain-head of that Law. I hold the old-fashioned faith that Man has an innate Moral Sense, which teaches him the difference between Good and Evil; and that he has a divinely implanted Conscience, which impels him to do good, and which reprimands him when he has done evil. I believe in the *Honestum*, not as an attribute of the *Utile*,

Utilitarianism the best test of Reasoned Truth.

The *Utile* not identical with the *Honestum*, but coincident with it.

* See this phrase explained from Grote's 'Plato' in note to page 34, *supra*.

but as superior to it in origin and in directive power. But the true *Honestum* and the true *Utile* must always coincide. If you demonstrate the *Utile*, you prove by implication the *Honestum* also*.

If you prove the true *Utile*, you prove the *Honestum* also.

Now the *Honestum* is in very many cases

Quod nequeo monstrare ac sentio tantùm;

but the *Utile* is always apt matter for observation, for exhibition, for comparison, for argumentative proof. It follows that for all practical purposes of teaching and of discussion it is best to take the principle of Utilitarianism as the test and standard of International Law. But it is all in all important first to ascertain, beyond the possibility of mistake, how many interests we consider to be included when the principle of Utilitarianism is appealed to.

The *Honestum*, though always to be felt, cannot always be demonstrated. The *Utile* is alway susceptible of proof.

49. Modern Utilitarianism involves very much more than the principle of the *Utile* which the

Meaning of the new term "Utilitarianism."

* "Such is the nature of things that the ideas of Just, Honest, and Useful are naturally connected, and, as it were, inseparable; at least if we attend, as we ought to do, to real, general, and lasting utility. We may say that such an Utility becomes a kind of characteristic, to distinguish what is truly just or honest from what is so only in the erroneous opinions of men. There is a beautiful and judicious remark of Cicero (De Offic. lib. 2. c. 3). 'The language and opinions of men are very wide,' says he, 'from truth and right reason in separating the honest from the useful, and in persuading themselves that some honest things are not useful, and that other things are useful but not honest. This is a dangerous notion to human life. Hence we see that Socrates detested those Sophists who first separated those two things in opinion, which in nature are really joined.'"—Burlamaqui *on the Principles of Natural Law*, p. 221, Nugent's translation.

best-known teachers* of the old school of Utility inculcated. According to them each man is to be

* I do not mean that the more extended view of the Utility principle, which now prevails, is entirely recent. Bishop Cumberland's treatise, 'De legibus Naturæ,' published in 1672, is an illustrious proof to the contrary. But his works, and the writings of certain others, who, before Austin, Mill, and Grote, taught the duty of regarding the interests of others, had little influence, compared with the effect produced by the last-mentioned writers. Bentham is not always consistent with himself on this subject. The variations of his dogmas are severely, but not unjustly, commented on by Professor Birks in his 'Modern Utilitarianism' (pp. 32, 151, and elsewhere). In Bentham's best-known works, such as his treatise on the Principles of Morals and Legislation, he makes each man's own pleasure and pain each man's sole rules for action. At other times he taught legislators to regard "the greatest possible happiness of the greatest possible number." In his fragmentary work on 'International Law,' first published after Bentham's death by Sir John Bowring in 1838, Bentham certainly treats "the common and equal utility of all mankind" as the object with respect to which a universal international code should be prepared. He gives in detail the following excellent utilitarian rules (part viii. of Works, p. 538).

"1. The first object of international Law for a given nation.—Utility general, in so far as it consists in doing no injury to the other nations respectively, saving the regard which is proper to its own well-being.

"2. Second object.—Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being.

"3. Third object.—Utility general, in so far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations.

"4. Fourth object.—Utility general, so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations.

"It is to the two former objects that the duties which the given nation ought to recognize may be referred. It is to the

guided solely by the consideration of what line of conduct seemed best for his own true personal advantage. The champions of this old school (of the "Expediency" school, as it was generally called) and of the Intuitive school often made a battle-ground of the field of Jurisprudence; but I do not think it necessary to review their conflicts. The Expediency Principle is now generally called the Principle of Utilitarianism, and it has changed much more than its name*.

Mill's definition of Utilitarianism.

50. Mr. John Stuart Mill, who gave this Philosophy its new appellation*, and who did more than any one else to quicken and to diffuse its spirit, declares it to mean the principle of acting so as to promote the happiness of all who are affected by our conduct. In Mr. Mill's own words†:—"The happi-

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two latter that the rights which it ought to claim may be referred. But if these same rights shall in its opinion be violated, in what manner, by what means, shall it apply or seek for satisfaction? There is no other mode but that of war. But war is an evil; it is even the complication of all other evils.

"5. Fifth object.—In case of war, make such arrangements that the least possible evil may be produced, consistent with the acquisition of the good which is sought for."

Paley is probably the best-known of all the writers of the old *Utile* or Expediency school. Paley, in his Treatise on Moral Philosophy, wholly ignores the existence of Conscience, and the existence of a Moral Law independently of Revealed Religion. The title which Coleridge gave to Benthamism may be justly ascribed to Paley's Philosophy. It is "The Gospel of Enlightened Selfishness."

* Mill's 'Utilitarianism,' p. 8, note.

† See 'Mill's Utilitarianism,' p. 24.

ness which forms the Utilitarian doctrine of what is right in conduct, is not the agent's own happiness, but that of all concerned."

Grote's definition.

Mr. Grote, in his work on Plato, where he refers to the principle of Utility as necessary to complete the Platonic element of Virtue, says expressly:—"I mean that Principle, which points out happiness or unhappiness not merely of the agent himself, but also of others affected, or liable to be affected, by his behaviour"*.

John Austin's doctrine as to the Utilitarian Principle based upon Religion.

51. I will quote another great writer of this school, Mr. John Austin, who in his treatise on Jurisprudence bases the Utilitarian principle on Religion, and thus describes it:—"The theory is this:—Inasmuch as the goodness of God is boundless and impartial, he designs the greatest happiness of all his sentient creatures. He wills that the aggregate of their enjoyments shall find no nearer limit than that which is inevitably set to it by their finite and imperfect nature. From the probable effects of our actions on the greatest happiness of all, or from the tendencies of human actions to increase or diminish that aggregate, we may infer the laws which he has given but has not expressed or revealed.

"Now *the tendency* of a human action (as its tendency is thus understood) is the *whole* of its tendency —the sum of its probable consequences, in so far as they are important or material, as well as its direct consequences, in so far as any of its consequences may influence the general happiness.

* Grote's 'Plato,' vol. iii. p. 456.

"Trying to collect its tendency (as its tendency is thus understood), we must not consider the action as if it were *single* or *insulated*, but must look at the *class* of actions to which it belongs. The probable specific consequences of doing that single act, or of omitting that single act, are not the objects of the inquiry. The question to be solved is, If acts of the *class* were *generally* done, or *generally* forborne or omitted, what would be the probable effect on the general happiness or good?"*

These definitions would satisfy Cicero.

52. Surely these definitions of Utility would have satisfied even Cicero, the most determined adversary of the *Utile* as commonly understood in opposition to the *Honestum*. Cicero lays down as the most desirable of all propositions for general adoption, the maxim that the consideration of what is useful for the individual should be identified with the consideration of what is useful for the whole community. "Ergo unum debet esse omnibus propositum ut eadem sit utilitas uniuscujusque et universorum."—*De Officiis*, lib. 3. vi. 29†. When this is done, the *Utile* and the *Honestum* must coincide:—"Nihil vero utile quod non idem honestum, nihil honestum quod non idem utile sit."

53. If the reader will compare the description of the Utilitarian Theory just cited from Austin with the description of Natural Law quoted out of Grotius a few pages back‡, he will see how closely they agree.

* Austin's 'Jurisprudence,' vol. i. p. 109.

† And see the passage cited by Burlamaqui, as copied in note to p. 50, *supra*.

‡ At p. 14, *supra*.

I will cite only one more description of Moral Law or Natural Law. It is a very able and correct one, though drawn by a writer who did not himself believe in Moral or Natural Law as being all in all sufficient. The reader will see that this description closely agrees with the rules of conduct, or the Principles of Utility, as laid down by the recent great Utilitarian writers to whom I have been referring.

Plumer Ward on the Moral-Sense school.

Mr. Plumer Ward states thus the theory held by the Moral-Sense school of writers respecting Natural Law as revealed to man by his Moral Sense, and as enforced on him by his Conscience.

"There is an universal principle of action in the hearts of all mankind, which is to seek happiness as social and benevolent beings. This may be drawn from a review of the internal frame or constitution of man, which leads him when unbiassed by his own particular interest to wish the happiness of all his fellow-creatures, to approve of virtuous actions whenever he observes them, and to detest their opposite vices. This approbation and detestation are imposed on him by a certain internal great and regulating principle called conscience or reflection, which, though his passions may lead him often to rebel against its power, it is nevertheless impossible wholly to blind or destroy.

"This great principle adjusting and correcting all inward movements ought to preside over and govern them. It is the instrument by which man is to be shown what his real nature leads him to; and obligations to the practice of virtue deduced from the review

of nature are to be considered as an appeal to each particular person's heart and natural conscience, as the external senses are appealed to for the proof of things cognizable by them. And thus, allowing the inward feeling *shame*, a man can as little doubt whether it was given him to prevent his doing shameful actions, as whether his eyes were given him to guide his steps." Mr. Ward here cites Bishop Butler, Sermon 6, 26.

Modern Utilitarians believe in sentiment of Justice.

54. The modern Utilitarians not only expound Utility on the enlarged principle recently mentioned (which makes the *Utile* coextensive with the *Honestum*), but they also expressly admit the existence of the Sentiment of Justice as a sentiment, "not arising from any thing which would commonly or correctly be called an idea of expediency." They state that its sources are two sentiments both in the highest degree natural, and which either are or resemble instincts,...the impulse of self-defence and the feeling of sympathy" *.

Need of Standard by which to test sentiment.

55. But all this is mere sentiment. It is still necessary to call in some moral principle to determine whether the sentiment is in each case to be acted on or curbed; or, if acted on, how it is to be guided. The moral principle which alone can safely decide this is (according to the Utilitarians) the principle of general Utility. This it is which gives justice its moral force.

General Utility is that Standard.

55 A. The modern Utilitarians admit the existence, and they speak in strong terms of the power and of the salutary influence of *Conscience*. Mr. Mill says:—

* Mill, p. 76.

"The internal sanction of duty, whatever our standard of duty may be, is one and the same—a feeling in our own mind, a pain more or less intense, attendant on violation of duty, which, in properly cultivated moral natures, rises in the more serious cases into shrinking from it as an impossibility. This feeling, when disinterested, and connecting itself with the pure idea of duty and not with some particular form of it, or with any of the merely accessory circumstances, is the essence of Conscience; though in that complex phenomenon as it actually exists, the simple fact is in general all encrusted over with collateral associations, derived from sympathy, from love, and still more from fear: from all the forms of religious feeling, from the recollections of childhood and of all our past life; from self-esteem, desire of the esteem of others, and occasionally even self-abasement. This extreme complication is, I apprehend, the origin of the sort of mystical character, which by a tendency of the human mind, of which there are many other examples, is apt to be attributed to the idea of moral obligation, and which leads people to believe that the idea cannot possibly attach itself to any other objects than those which, by a supposed mysterious law, are found in our present experience to excite it. Its binding force, however, consists in the existence of a mass of feeling, which must be broken through in order to do what violates our standard of right; and which, if we do nevertheless violate that standard, will probably have to be encountered afterwards in the form of remorse. Whatever theory we have of the

Existence of Conscience admitted.

nature or origin of Conscience, this is what essentially constitutes it"*.

These admissions practically sufficient.

56. So long as the existence and the authority of the moral sense (or sense of Justice) and of Conscience are thus recognized, there can be no mischief in bringing our projected rules of conduct to the test of Utility, always remembering that "the happiness, which forms the Utilitarian standard of what is right in conduct, is not merely the agent's own happiness, but the happiness of all concerned."

Clear necessity of some Test.

57. On the other hand, I believe that even the most transcendental moralists of the Intuitive school (to which I profess my strong adherence) must admit the necessity of some general test, by which each man may try the accuracy of his own perceptions of the Innate Moral sense, and by which he may also ascertain whether the Conscience which guides him is free from illusion and imperfection.

* Mill, 'Utilitarianism,' p. 41. Mr. D. Dudley Field in his 'Compte Rendu' (dated Oct. 25, 1873) of the Proceedings of the Society, "pour la Réforme et la codification des Lois Internationales," said as truly as eloquently of the spirit of International Jurisprudence, that it is "La conscience Juridique du monde civilisé." I quote the words in the French, as sent to me by Mr. Field himself. Sir James Mackintosh says:—"A part of the actual constitution of human nature is that we feel complacency, remorse, etc. Whether this be an original law or a principle necessarily produced in every human being by the operation of circumstances on the original elements of the human mind, is a question of great curiosity in science, but of no importance in practical morals. The law or the principle is equally universal, equally indelible, equally part of the design of the Deity." —Vol. ii. Memoirs, p. 365.

57A. The fact that people may be thoroughly conscientious, and act conscientiously in such a manner as to work much wrong and misery, is a fact sufficiently obvious in the affairs of private life; but it is still more strongly manifested in public matters which make up the events of history. Take for instance the numerous sovereigns and statesmen who have been persecutors for the sake (as they believed) of religion. The single example of Philip II. of Spain is enough. It has drawn from our historian Froude (vol. xix. p. 313) the just observation that "the most cruel curse which can afflict the world is the tyranny of ignorant conscientiousness."

Conscience not infallible.

58. In truth, if we hold that each man is to govern his conduct solely by the standards which he finds within himself, without at the same time striving to secure the adjustment of those standards, we are tainting ourselves with the old Protagorean Archheresy, which has been for ages the dread and the abhorrence of Intuitive Moralists. We should be adopting the doctrine, "that every man is his own standard of right and wrong, of truth and falsehood," the "Πάντων μέτρων ἄνθρωπος"*, the *Homo mensura*.

Risk of falling into the Protagorean heresy.

The *Homo Mensura*.

* See the Theætetus of Plato, p. 151 E. Professor Birks well observes (page 77) that the true fault of the Intuitive Moralists is not their recognition of a final and ultimate principle in Morals of an Intuitive kind. "It is that they exalt the imperfect decisions of individual conscience too high." "*The general question in morals is not what men do feel, but what they ought to feel.* . . . . In its details it must depend largely on materials borrowed from the actual experiences of human life."

sura in the short Latin formula by which the tenet is best known to Ethical disputants.

59. Men may know all this—they may be aware of their own imperfections and liabilities to error, and they may strive to the utmost for instruction from above and from around; and they may earnestly seek so to gain the *Lumen acquisitum*, which Bishop Sanderson in his treatise on the Conscience distinguishes from the *Lumen Innatum*. Men may do all this, and yet may differ widely from each other as to the conclusions of their moral sense, and as to the voices of their consciences. But if they are Moralists, they must agree with Cicero in holding that in all their thoughts, words, and actions they should seek after the *Honestum*—that the *Honestum* and the true *Utile* are coincident, and that the true *Utile* consists in studying the general welfare of all. Here, then, they may find a test to which they may bring their various opinions, so as to be able to consider profitably how far the policy which each advocates is calculated to promote in reasonable degree the good of all who are to be affected by it. The policy, which does not satisfy this test, may have been prompted by Conscience; but it must in that case have proceeded from a mistaken and imperfect Conscience; and therefore a conscientious man will not seek to enforce it.

Need of the *Lumen acuisitum* to aid the *Lumen Innatum* of Conscience.

The true *Utile* to be made the test of each man's ideas as to the *Honestum*.

60. There is also this important practical advantage in trying theories and rules by the test of Utilitarianism, that it is the only possible way in which we can hope to make truth prevail over error by calm

Search for the true *Utile* may be conducted through argument.

reasoning and by peaceable discussion. But if one man says "My moral sense of the eternal principles of Justice tells me that such and such a policy or measure is right," and if another man says "My moral sense of the Eternal principles tells me just the contrary," it is impossible that either of these two men can bring the other over to his own opinions by arguments addressed to the understanding, or that by the mutual use of arguments they can arrive at any modified form of opinion. They may scold and they may fight, but they cannot reason. But if these two men will agree to test the controverted policy by examining whether, if acted on as a rule, such a measure would or would not promote the general welfare of all affected by it, the field for dispassionate inquiry into facts, for comprehensive induction and for accurate deduction is at once opened. There is a fair possibility of an honest conversion; there is still greater possibility of a salutary and peaceful compromise*.

"Eternal Principles" not in themselves matters of argument.

61. I will yet further justify myself for using the Utilitarian test for discussing International Law, by the example of three great modern writers in this department of Jurisprudence, each of whom is generally and rightly regarded as a Moralist. Burlamaqui, in a passage which I have already cited, points out the true *Utile* as the characteristic whereby we may recognize the true *Justum* and *Honestum*. Vattel in his 'Essai sur le droit naturel' says:— "L'homme est d'une nature sociable; la société lui est naturelle, elle lui est même nécessaire pour passer

The true *Utile* recognized as the distinguishing characteristic of the *Honestum* by Burlamaqui; by Vattel;

* See Austin, vol. i. p. 122.

sa vie heureusement. De là vient que le judicieux Grotius a pris cette sociabilité de l'homme pour la fondement du droit naturel. . . . Chaque individu a pour motif général et premier son utilité propre; et ce motif fait l'obligation dont il est susceptible. Mais la société lui étant utile et même nécessaire, et cette société ne pouvant subsister sans des lois ou des règles générales, observées par tous les membres; il est obligé en vertu de sa propre utilité à les observer. Il ne doit même pas balancer à leur sacrifier dans des cas particuliers un avantage présent; parce que ce sont elles qui lui assurent la paisible jouissance de tous ses autres biens"*.

by Story.

Mr. Justice Story, at paragraph 43 of his great work on the Conflict of Laws, says:—"The true foundation on which the administration of International Law must rest, is that the rules, which are to govern, are those which arise from mutual interest and utility, from a sense of the inconveniences which arise from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return."

Actions are to be judged not as isolated occurrences, but as instances of Rules.

62. I must again remind students of International Law of the great importance of attending, when we apply the test of Utilitarianism to a proposed law, or policy, or act of State, to Austin's caution that we must not consider the action or measure as if it were single and isolated, but that we must resolve the following question—What would be "the probable effect on the general happiness or good, if *similar* acts, forbearances,

* Sects. 23 and 24.

or omissions were general or frequent?" Austin (in his second Lecture) gives strong reasons (which deserve every student's careful attention) for stating the case thus. And, indeed, before his time, Paley (though limiting the view of utility to a view of what might be most expedient for the agent personally) very clearly demonstrated that in all considerations of utility general rules and general consequences are to be regarded. The first chapter of the second book of his 'Moral Philosophy,' illustrates this by examples, which are stated with all his characteristic clearness and strong common sense.

Austin.

Paley.

63. Any one who has been satisfied by this chapter as to the sufficiency of Utilitarianism as a Test in Jurisprudence, will not think that the space bestowed on it is disproportionate. It will help us through many difficulties. Having gained this light for our path, and this staff for our steps, we will proceed to the complex region of Positive International Law. But I will first remark that we can prove by Utilitarianism the not immaterial fact that the commonwealth of Civilized States, and the human race in general, are benefited by the *existence* of International Law. I will do this briefly by appealing (in Mr. Senior's words) to "The general desire of mankind that the mutual conduct of nations should be governed or at least directed by recognized rules, that there should be some principle to be invoked by the weak, and yielded without humiliation by the powerful."

Importance of the Principle of Utilitarianism as a guide in International Law.

It proves the benefit of the existence of such law.

This desire, as he truly says, has brought into existence a whole literature on International Juris-

prudence. This International-Law literature has partly created and partly been created by the public opinion of nations; for (again to use Mr. Senior's words) "it is clear that there exists among nations a public opinion. Unhappily the public opinion of nations has often been miserably misinformed, and miserably weak; but with all its imperfections it has been one of the principal aids to modern civilization, and we trust that it is destined to perform services still more important and still more extensive."

Public Opinion.

64. It is needless to argue this point further. I proceed to a Jural maxim which may be regarded as a corollary of the last one. I take it to be sound doctrine, having regard to the welfare of all affected, that where a principle or a rule of International Law has been once fairly recognized and established, it should not be abrogated or changed without grave and urgent cause; and abrogation or change should not take place without the consent of all, or of nearly all, those who are affected by it.

Changes in International Law not to be made hastily.

In other words, a change of Law is in itself an evil; and this is to so great a degree a truism, that it requires no argument; but it forms nevertheless a rule of great practical importance, and one that is too often disregarded.

CHAPTER IV.

On International Positive Law.

Characteristics of Positive Law.—Definition.—Lord Bacon's Definition.—"Sanction" explained.—The Sanction of International Law is War.—Positive Law may fall short of or extend beyond Moral Law.—Proper Jural meaning of the epithet "Positive."—Objections to the reality of International Positive Law stated and answered.—Advice as to mastering Definitions.

65. While examining the distinctions between Moral or Natural Law and Positive Law, we were obliged to consider briefly the characteristics of the latter*; but we must now ascertain them more completely and carefully.

Characteristics of Positive Law.

66. Positive International Law means collectively the system of definite rules which have been recognized and established as practical rules of conduct between States, and the observance of which may be enforced by War.

Definition.

66 a. A Positive Law means a Law in the precise narrow sense in which alone many modern writers wish the word "Law" to be used by Jurists. It means a rule of conduct prescribed by a human superior, who has the power to inflict physical evil if his command is disregarded. In other words, it is a rule of human commandment, having the sanction of Physical Force.

* See pp. 12, 15, *suprà*.

67. This last definition was suggested by the passage in Lord Bacon's 'Aphorisms' *, in which he says, "*Lex nihil aliud quam regula imperans.*" In adopting this definition, I take the word *Imperans*† to imply not only that the Law-giver speaks as one having authority, but also that peculiar authority which the Romans termed *Imperium*—that he is a Superior having full *Imperium* annexed to his Jurisdiction, and having therefore the power, both the actual and the rightful power, of using the Sword for the correction of wrong-doers ‡.

Lord Bacon's aphorism as to *Lex*.

The *Imperium* of the Law-giver when the Law is *Lex-Law*.

68. This is the "Sanction of Physical Force," which, in the precise sense in which I am now dealing with Positive Law, as contradistinguished from Moral Law, I take to be an essential attribute of a Positive Law. To state the matter shortly, Moral Law has only the sanctions of religion and of moral force; Positive Law has the additional sanction of physical force. This distinction (whether assented to or not) will be at once understood by those who are even

Physical-Force Sanction of *Lex-Law* not of *Jus-Law*.

* Bacon's Works, vol. i. Ellis and Spedding's edit. p. 822.

† The common criticism on Bacon's terminology, that he ought to have said "regula summi imperantis" instead of "regula imperans" hardly requires notice; but I cannot altogether claim the authority of Bacon in support of the definition which I have given. An examination of the whole aphorism (the 83rd) from which this passage is taken, and of the aphorisms which precede and follow it, shows that Bacon used the words "regula imperans" with a purport not identical with that of which I found them suggestive when separately considered.

‡ "Merum est Imperium habere gladii potestatem ad animadvertendum in facinorosos homines. Mixtum est Imperium cui etiam Jurisdictio inest."—Ulpian, *Digest.* 2. tit. 1. sect. 3.

moderately familiar with the phraseology of Jurisprudence; but the word "Sanction" may require explanation to some who might otherwise suppose it to be employed in its popular meaning of "Approval." In this, as in many other cases, our popular usage of words has receded more and more widely from that which was their original, and still is their technical meaning. This fact is of itself no slight proof of the general neglect of the study of Jurisprudence in England during the last two centuries.

Inaccurate sense in which the word "Sanction" is now popularly used.

69. "Sanction" means primarily that which ensures, or is designed to ensure, the observance of a compact, of a promise, or of a command*, as, for example, the religious rites by which contracting parties bind themselves to keep a treaty, the oath by which a witness pledges himself to speak the truth, or the punishment by the threat of which he who

Proper meaning of word "Sanction."

* "'Sanctio' in Latin was used to signify *the act of binding*, and by a common grammatical transition, any thing which serves to bind a man—to wit, to the observance of such or such a mode of conduct. According to a Latin grammarian, the import of the word is derived by rather a far-fetched process (such as those commonly are, and in a great measure indeed must be, by which intellectual ideas are derived from sensible ones), from the word *sanguis*, blood, because among the Romans, with a view to inculcate into the people a persuasion that such or such a mode of conduct would be rendered obligatory upon a man by the force of what I call the religious sanction (*i. e.* he would be made to suffer by the interposition of some superior being, if he failed to observe the mode of conduct in question), certain ceremonies were contrived by the priests, in the course of which ceremonies the blood of the victim was made use of."—Bentham's note to the third chapter of his 'Principles of Morals and Legislation.'

gives a command tries to prevent a breach of his commandment. In its amplest sense it may mean, 1st, a cause or any source of feeling which induces a man to keep any rule of conduct; and 2ndly, any feeling which acts as such an inducement.

Sanction used specially in sense of Penal Sanction.

70. But though several feelings, besides the fear of punishment, may and do operate as sanctions of a rule of conduct, the term "Sanction" has been and is used by most jurists as peculiarly denoting the penal consequences assigned to the breach of a Law; that is to say, they use it when they are dealing with a specific Positive Law, and not with the general principles and maxims of Moral Law only. This was so much the case with the Roman Lawyers, that they called a Law, which provided no penalty for the breach of it, a law of imperfect obligation. There is also much force in some remarks which (with the variation of two words) I borrow from Mr. Austin on this point*:—"It is the power and the purpose of inflicting eventual evil [rather than] the power and the purpose of imparting eventual good, which gives to the expression of a wish the name of a command." The definite practical evil of punishment inflicted or assured by the employment of physical force is the most obvious, the most common, and the most effective of the sanctions that can be devised by men. It is generally understood in Jural language to be specially denoted by the simple phrase, "The Sanction

Usage of Roman Lawyers.

Other authorities and reasons.

* Province of Jurisprudence, vol. i. p. 93. Mr. Austin uses here and italicizes the word "not." I have adapted in order to adopt.

of a Law." In the internal administration of Justice in each State, Law-suits * and prosecutions apply this Sanction. In the administration of Justice between State and State, this Sanction is applied by War.

71. Positive Law may do and frequently does, in respect of its subject, nothing more than enounce and enjoin some principle or maxim of Moral Law. For example, Positive Law generally enforces the maxim *Pacta sunt servanda*, which was pointed out in a former chapter as a cardinal Moral Principle. But Positive Law very often passes over things dealt with by Moral Law. On the other hand, it may extend (and great part of Positive Law *does* extend) to the forbidding or commanding of acts which by mere natural Law are held to be indifferent. Acts of this kind are neither bad nor good in themselves; but they acquire a character of evil or of good when they thus become the subjects of Positive Legislation.

Its frequent extent beyond Natural Law.

72. The word "Positive" has a meaning in common speech which would be mischievously fallacious, if we allowed it to operate on our minds when we are speaking of Positive Law as contradistinguished from Natural Law. The addition of the epithet "Positive," when we talk of a fact, generally means that the fact is one of peculiar and superior certainty. But when the epithet "Positive" is applied by Jurists to a Law, it merely means that the Law in question has been

Fallacious popular usage of the epithet "Positive."

Its proper Jural meaning.

* Not only Criminal Law, but Civil Law also has its penal sanction. A man's person, his lands, and his chattels are liable to seizure by the officers who execute the process of the Civil Court; and if he resists that process he makes himself liable to be tried and punished as a criminal.

established as a Law to be practically enforced by men among men.

The sense of the misconception, which is apt to arise from the popular sense of the word "Positive" led Raleigh, when speaking of Positive Laws, to use also the cautionary phrase, "Laws imposed, or of addition" *.

Dr. Whewell † adds to "Positive" the explicatory epithet "Instituted."

Objections to the reality of International Positive Law.

73. Objections have been made to the reality of International Positive Law on two grounds. First, it is alleged that no International Law is the command of a certain definite superior to a person or persons in subjection to him; and, secondly, it is alleged that the party by whom International Law is to be enforced, is never determinate and assignable ‡.

Answer to these objections.

74. We may answer, first, with regard to the source whence the Law emanated, that although Sovereign States acknowledge no one common Superior Lawgiver from whom they collectively receive imperative Law, yet they can and do make up a community capable of establishing Laws which shall be binding on each member of the community. In this sense the community at large is a sovereign Lawgiver to each member of the community. And further, with regard to the supposed difficulty as to who will apply the Sanction of International Positive Law, we may pro-

There is a Superior who commands International Law.

Reality and sufficient certainty of the Penal Sanctions of International Law.

* History of the World, part 1. book iv. ch. iv. sect. 5.

† In his translation of Grotius.

‡ See Austin's 'Province of Jurisprudence,' vol. i. *passim*, and especially at p. 231.

ceed to observe that when the Community of States agrees and ordains that certain rules of International conduct are to be upheld by force, and that redress for breach of them is to be obtained by arms, those rules become *Regulæ Imperantes*, in the sense in which I have explained the word *Imperans* *; and they acquire the penal sanction which is necessary for a Positive Law. The fear of War is something more than an ordinary Moral sanction. It is the sanction of that peculiar kind of Moral Force, which is "*Physical Force in Perspective*;" and it gives ample sanction to a Law †.

Frequent uncertainty of the application of the Penal Sanction to the breach of a municipal Law.

75. But it is said that when rules of conduct between States are broken, it is frequently uncertain who will be the Belligerent executive of (so-called) International Law, or whether there will be any Belligerent execu-

* See p. 66, *suprà*.

† "Whenever the sanction of a rule of conduct is Physical —in other words, whenever the sanction is fear of injury to person or property, the rule may be properly classed under the head of Law, as distinguished from Morality, the sanctions of which are only to be discovered in the human conscience.

"It may be asked accordingly what are the physical sanctions to the rules which regulate the intercourse of nations? It was one of the main objects of the system of Grotius to supply an answer to this question. The Right of War, *purum piumque duellum*, according to the formula of the Roman Fecials, furnishes the principle. 'War,' said the great Athenian orator, in the declining days of Athens, 'is the mode of proceeding against those who cannot be restrained by a judicial proceeding; for judicial proceedings are of force against those who are sensible of their inability to oppose them; but against those who are or think themselves of equal strength, War is the proceeding; yet this too, in order that it may be justified, must be carried on with no less scrupulous care than a judicial proceeding.'"—Travers Twiss, *Law of Nations*, pref. vii.

tive at all. The reply is, that even so in the internal affairs of a State it is often uncertain who will be the Litigant Plaintiff, or whether there will be any Litigant Plaintiff at all against a dishonest man; and it is also often uncertain who will prosecute, or whether any one will prosecute, when a crime has been committed. This last remark is especially applicable with regard to countries, such as England, in which there is no determinate Public Prosecutor. Yet no Jurist ever has denied or would deny that England has laws, and laws with penal sanctions in the strictest sense of the words. The truth is, that the degrees of certainty or uncertainty as to who may set in motion municipal laws between members of the same State, or International Laws between different States, affect only the degree of the efficacy of the Penal Sanction in each case. They cannot negative its existence.

Uncertainty of a Sanction's application does not disprove its existence.

76. I may remark here, that other Jurists have maintained that States cannot be the subjects of Criminal Law, and that it is inaccurate to speak of the infliction of punishment upon a State. But, in reality, these opinions must either arise from mistaken ideas about Criminal Law in general, and about the true objects of judicial punishment, or they have no better basis than a mere quibble as to the use of words. The ablest of the writers to whom I allude, admits that the great purpose of International Law is to maintain right against national wrong-doers—that a State may be injured and insulted by another, may seek redress by war, or may require the deposition of the ruler, or the exile of the representative of another

Notice of an objection sometimes made to admission of terms and ideas of Criminal Jurisprudence into International Law.

State, or may deprive a State of its territory wholly or in part*. But if a State can, as a State, do wrong, if it can, as a State, be guilty of insult and injury, it certainly can, as a State, do that which cannot be distinguished from crime by any substantial difference. And if a State can, for having done such things, be lawfully afflicted with hostilities, with fire, famine, and slaughter, and the other dread concomitants of warfare, if it can, further, for having done such things, be lawfully enfeebled by being deprived of part of its territory, or even lawfully destroyed by the whole of its territory being taken, it seems difficult not to consider that the offending State is, in such cases, treated as a criminal, and punished accordingly.

Caution as to false general theories of Penal Legislation.

77. If, indeed, it is supposed that the infliction of Punishment in Criminal Law is, and ought to be, ordained for the mere sake of gratifying Revenge, and that the pains suffered by an offender at the hands of the ministers of justice are in themselves the ultimate objects of justice, and not its means for the accomplishment of ulterior purposes, then it must be conceded that the terms "criminal" and "punishment" are inapplicable in International Law. But it is erroneous to regard Criminal Law, and its procedure generally, in such a light†. The proper objects of

* Phillimore, vol. i. pp. 4, 5, 6.

† The theory of a State not being the subject of punishment has probably proceeded from some old legal theories about Corporations being incapable of malice, and therefore not criminally punishable. Our English Courts have, of late years, very wisely followed a different course in their de-

Proper theory of Penal Legislation.

punishment are (besides the compelling, in cases where it is possible, such restitution or compensation as may redress the mischief which the wrongful act in question has caused to the party who has been immediately injured), to secure the future safety of the members of a community generally by, 1st, inducing the offender himself to abstain from offending again; 2ndly, by making it physically difficult or impossible for him to offend again; and 3rdly, by deterring others from similarly offending. All these apply to forcible and afflictive judicial procedure against a State, as well as to forcible and afflictive judicial procedure against an individual.

Applicable to International as well as to Municipal Law.

78. The writers to whom I allude would, I believe, admit the applicability in International Law of forcible process for the recovery of satisfaction, or for preventing injury, or for any thing else which they

To admit the Sanction of Physical Force in International Law for purposes analogous to Civil process is to admit it for penal purposes also.

cisions as to the liability of corporate bodies. See Lord Campbell's judgment in the case of Whitfield *v.* the South-Eastern Railway Company, in vol. x. of Ellis and Blackburn's Reports, and see the other cases there cited in the arguments and the judgment.

If the theory as to the proper purposes of punishment, which I have upheld in the text, be objected to as too exclusively utilitarian, and if it be said that one end of punishment is to appease the indignation of good men at the triumph or the escape of evil-doers, I would not deny the rightful existence of such a feeling, or the propriety of regarding it in penal legislation. Such a feeling, or even "the strong antipathy of good to bad" (as Pope phrases it), differs widely from a desire for the "invidiosa solatia" of gloating over the personal pangs of a punished criminal. But the same honest indignation and the same just antipathy would be felt towards a State that systematically and insolently outraged the rights of other States.

would consider analogous to the process of Civil Law in municipal jurisprudence. But it is impossible to frame and maintain consistently in contentions between States any such distinction as that between the criminal and civil branches of a single State's legal system. Even in municipal law it is hard to keep to such a boundary line; and the process of civil judicature would be of little value, were it not for the coexistence and ever-ready support of the strong arm of Criminal Law. If debtors could successfully oppose violent resistance to sheriff's officers without making themselves liable to indictment, the creditors' writ would be an unprofitable piece of parchment. I have not thought it necessary, when speaking of the Sanction of Physical Force in International Positive Law, to discriminate between the various purposes for which it may be served, as simply compensatory, as simply preventive, as simply punitive, or as compounded of two or more of these three.

Laws are commands; but as Right implies Duty, and Positive Duty implies command, the declaration of a Right, or of a Duty, may itself be called a Law.

There is yet one other matter to be noticed with reference to the use of special terms in these discussions. It has been said that "Positive Law" is a Rule of conduct commanded by a Superior: and, indeed, every law involves the idea of a command, unless it be merely a law which repeals a former law. But many rules, which are Positive Law as well as Moral Law, will be quoted and stated in these pages, not in the express form of commands, but as assertions of Duties, or as declarations of Rights. It will save time and repetition if the reader is at once re-

minded that every declaration of a legal Right existing in one person, involves the assertion of there being a legal duty in some other person or persons to respect that Right, and that every assertion of a legal duty involves a command to observe that duty.

79. It is generally found useful to divide International Positive Law into two branches:—1st, Conventional Law, which means the Law made by express convention or agreement on a particular subject. This may be best considered when we speak of Treaties. The 2nd branch is by far the most complex and important, and is styled "Consuetudinary Law." It will form the subject of the next chapter.

Note to Students.

Beginners in the study of International Law are recommended before they proceed beyond these first four chapters to ascertain carefully that they thoroughly and accurately understand and remember the explanations which have been given of the meanings of the terms "*International*," "*Sovereign State*," "*Law*," "*Moral Law*," "*Natural Law*," "*Laws of Imperfect Obligation*," "*Expletory and Attributive Justice*," "*Comity of Nations*," "*Positive Law*," "*Sanction*," and "*Conventional Law.*"

CHAPTER V.

On Consuetudinary International Positive Law, and its Proofs and Authorities as Positive Law.

True Consuetudinary Law, how to be ascertained.—Writings of Great Publicists, their value, names of principal.—Decisions of Prize Courts and other International tribunals.—Boards of Arbitration.—The Roman Law.—Modern International Law mainly built up out of Roman.—Treaties, Manifestoes, Ordinances, Proclamations, &c.—Value of Treaties as indirect evidence.—Need of study of History, especially Modern History. —Histories of International Law.—Discrepancies of Publicists' opinions, and of other authorities.—New cases.—Need of general principles.—Value here of Moral International Law. —Special advantage of Utilitarian Principle.

Lord Stowell's remarks on true Consuetudinary Law.

80. According to the high authority of Lord Stowell, a Court which administers International Law must look to "the legal standard of morality found in the Law of Nations, as fixed and evidenced by general and ancient and admitted practice, by treaties, and by the general tenour of the laws and ordinances, and the general transactions of civilized states" *.

Great extent of Consuetudinary Law.

81. This description shows how large a portion of this law consists of *Jus Consuetudinarium* and is not founded on any express compact, but on the implied will of the great commonwealth of nations that such and such rules shall exist. *Placuit Gentibus* is the phrase which Grotius employs on

* Judgment in case of Le Louis, 2 Dodson's Rep. 249.

such occasions; and Lord Stowell, in another celebrated judgment, has adopted and ratified that expression *.

"It has been the peculiar duty of the Tribunals of the Law of Nations to investigate with precision the *Jus Consuetudinarium*, and to separate the fluctuating institutions of particular nations from the established practice of mankind" †.

Means for ascertaining it.

82. What means are there for conducting this investigation? Where are we to find the proofs that any particular portion of International Law has been made International Law by the implied consent of Civilized States?

1st. Writings of great Publicists.

83. The first and most obvious source of information which we can have recourse to, will be found in the numerous books, which we now possess, written by eminent jurists on the subject of International Law. The nature and the extent of the authority which these text-writers possess, is tersely and admirably explained by one of our countrymen, Mr. Polson ‡.

Polson's remarks on their value.

"Generally, it is to the works of eminent Jurists that the nations of Europe appeal as authorities in the determination of their mutual differences. Our own country has been distinguished by the deference she has on all occasions paid to these enlightened and venerable expositors of International Jurisprudence." When we speak of them as possessing *authority*, we

* The Heinrich and Maria, 4 Rob. 54. See Dr. Travers Twiss's comments on this in his 'Law of Nations,' vol. i. p. 124.

† Travers Twiss, p. 123.

‡ P. 14.

employ the term in the sense in which it is used by Livy in his character of Evander. "Evander tum ea, *auctoritate* magis quam imperio regebat loca" (Liv. i. 7). "A learned writer," says Harrington in his 'Oceana,' "may have authority though he has no power." Civilized America fully recognizes the importance of this source of information as to International Law. Chancellor Kent says, "In cases where the principal Jurists agree, the presumption will be very great in favour of the solidity of their maxims; and no civilized nation that does not arrogantly set all law and justice at defiance, will venture to disregard the uniform sense of the established writers on International Law" *.

Chancellor Kent's.

84. Grotius is the patriarch of Publicists. Puffendorf and Bynkoershoeck have long ranked high. Perhaps the writer who has for a century and a half been most extensively studied, most popular, and therefore very influential, is Vattel. There are many more Jural Leaders of the 17th and 18th centuries, whose works are deservedly conned over by the student, and respected by the statesman and the judge; but here I mention those only whose authority has been most extensive. During the present century, and especially during the last twenty years, a very great number of Jurists have written on Inter-

Names of some of the leading Publicists.

* 1 Kent, 18. Bluntschli says of this subject:—"La science du Droit ne possède q'une autorité morale; mais l'absence de législation Internationale augmente la valeur des sources secondaires de notre Droit. La science comble de nombreuses lacunes en développant et en proclamant, avec l'aide et l'autorité de la raison, les principes destinés à régler les rapports internationaux" (p. 61).

national Law, and have acquired so much reputation that their opinions have been respectfully cited and examined by those who have had to decide on very serious questions between two of the greatest nations of the civilized world: I allude to the proceedings in the recent Geneva Arbitration *.

85. I do not feel it to be part of my present duty to frame schemes of reading, or to recommend particular books to students; but having named the best-known and most influential text-writers on International Law who wrote before the 19th century, I may add that among the more recent publications on the subject, in which the clearest and fullest information is given, are:—the works of the American authors Kent, Wheaton, Lawrence, Halleck †, Lieber, Woolsey, and Dudley Field; of the French, Ortolan; of the German, Heffter and Bluntschli; and of the English jurists, Phillimore, Mountagu Bernard, and Travers Twiss.

Recent eminent Publicists.

* The following are some of the modern writers on International Law there cited and commented on:—

English. Phillimore, Reddie, Twiss.

American. Kent, Dana, Wheaton, Story.

French. Hautefeuille, Ortolan, Massé, Jacquemyns.

Italian. Avio, Gola, Galiani, Azuni, Sandona, Casanova.

German. Heffter, Bluntschli, Gessner.

Spanish. Calvo.

† General Halleck collected the materials of his work on International Law for his own guidance (as he states in his preface) "during the war between the United States and Mexico, when he was serving on the staff of the Commander of the Pacific squadron, and as Secretary of State of California, and was often required to give opinions on questions of International law growing out of the operations of the war."

A book thus written by a practical soldier and statesman,

86. The fact that the consent of Nations has been given to particular rules and maxims so as to make them Positive International Law, "is also evidenced by the decisions of Prize Courts, and of the tribunals of International Law sitting in each country" *, and

Decisions of Prize Courts.

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who was also a man of learning and industry, is, as might be expected, characterized by clearness and strong common sense. He never shirks a difficulty. The only fault of the volume is that it has no index. I class Lieber among American Jurists because it was in the United States that he found his country, his home, and his language for more than the last fifty years of his life. Lieber was born at Berlin in 1788. He served as a volunteer in Blücher's army in the German war of liberation 1813–14; and he served again against the French in 1815, and was severely wounded at Waterloo. In 1820 his avowed love for constitutional liberty brought on him the suspicions of the Prussian Government, which was then an organ of the doctrines of the Holy Alliance. He escaped to Greece, and took part for a time with the Greeks in their war for independence. He then settled in America. He was for several years Professor of History, and of Political Philosophy and Economy in the State College of South Carolina. In 1857 he was appointed Professor of History and Political Science in Columbia College, New York. Among his works are a treatise on 'Political Ethics,' one on 'Civil Liberty and Self-Government,' and a smaller publication 'On Nationalism and Internationalism.' During the American Civil War he drew up, at the request of Mr. Stanton, the United States Minister of War, a paper of "Instructions for the American Army in the field." This very valuable statement of the Laws of War to be observed by invading armies, will be found often referred to in the present volume.

America and the civilized world in general have lately had to deplore, in his death, the loss of one whom the French jurist, M. Laboulage, has truly styled "Une des figures les plus originales parmi les jurisconsultes de notre temps."

* 1 Phillimore, 58.

of International Boards of Arbitration *. A Prize Court is a court not merely of the country in which it sits, but a court of the Law of Nations. Such was the exalted and the true ideal of these tribunals which was declared by Lord Stowell †; and by reason of the enlightened view which he thus took of his duties, as well as on account of his profound learning, keen discernment, and brilliant accomplishments, Lord Stowell's judgments have been, and are, received on both sides of the Atlantic "with very great respect, and are presumptive, though not conclusive, evidence of the law in the given case" ‡. Similar deference is paid in Europe as well as in America to the judgment of the great Jurists and Judges of the United States, Story, Kent, and Marshall. And it is not merely Prize Courts or the Courts of Appeal from them, which are looked up to as authorities. Many important questions of International Law come in peace-time as well as in time of war, before the tribunals of civilized countries: and the expositions of this Law, which are thus obtained, are observed throughout the civilized world always with respect, but of course with an amount of respect proportioned in each case to the dignity of the court, to the character of the judges constituting it, to the concurrence or diversity of their opinions, to the fulness

* Polson, 15; Wheaton, Elem. 57, English version.

† See in 1 Phillimore, p. 52, citations of Lord Stowell's eloquent words on this subject in the cases of 'The Maria,' 1 Robinson, p. 350, and 'The Recovery,' 6 Dodson, 348.

‡ 1 Kent, 81.

of the discussion, and to the learning and wisdom displayed in the judgment itself.

87. Similar respect, similarly varying in degree, is paid to the decisions on general principles of the mixed Boards of Arbitration, which are from time to time appointed by States for the amicable settlement of their differences. Boards of Arbitration.

88. The Publicists and the Judges whose writings and decisions we have been speaking of as guides in the study of our subject, profess repeatedly their own deep obligations to the *Roman Law* as "an authority to direct and guide the reason of States in the adjustment of their mutual relations." According to Phillimore, "The Roman Law may be said to be the most valuable of all aids to a correct and full knowledge of international jurisprudence, of which it is indeed, historically speaking, the actual basis." In other passages which have been adopted and repeated by the American writer, General Halleck*, the same Jurist says, "It will generally be found that the deficiencies of precedent, usage, and express international authority may be supplied from the rich treasury of the *Roman Civil Law*. Indeed the greater number of controversies between States would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to States." "Although," says Wiseman, "the Civil Law was not intended by the Roman legislators to reach or direct beyond the bounds of the Roman Empire, ... , yet, Importance of Roman Law. Phillimore on this, and Halleck. Wiseman.

* Page 55.

since there is a strong stream of natural reason continually flowing in the channel of the Roman laws, and that there is no affair or business known to any part of the world now, which the Roman empire dealt not in before, and their justice still provided for, what should hinder but that, the nature of affairs being the same, the same general rules of justice and dictates of reason may be as fitly accommodated to foreigners dealing with one another (as it is clear that they have been by the civilians of all ages), as to those of one and the same nation, when one common reason is a guide and a light to them both? for it is not the persons, but the case, and the reason therein, that is considerable altogether." The same English civilian further observes, "And moreover by, as it were, a general consent of nations, there is an appealing to, and a resting in the voice and judgment of the Civil Law in these cases between nation and nation. The reason whereof is, because any thing that is irrational, unnatural, absurd, partial, unjust, immodest, ignoble, treacherous, or unfaithful, that law abhorreth; and for that it is the most perfect image and representation of nature, and of the equity and reason nature prescribes to humane actions, that was ever yet presented or set forth to the world in a law"*.

Modern International Jurisprudence was actually based on Roman Law.

89. I have quoted Phillimore's observation that, historically speaking, the Roman Law is the actual basis of modern International Jurisprudence. Very valuable proofs of this fact, and of the processes by

* Wiseman's 'Excellencies of the Civil Law,' cited in 1 Phillimore, pp. 31, 33; and see Halleck, p. 55.

which it was wrought, will be found in the fourth chapter of Sir Henry Maine's 'Treatise on Ancient Law.' He points out how Grotius, and the Publicists who followed him, adopted their idea of a universal Moral Law, *Jus Naturæ*, or *Jus Naturale*, from the Roman Jurisconsults, who themselves had acquired it from the old Stoic Philosophy. Having adopted from the Antonine Jurisconsults the position that the *Jus Gentium* and the *Jus Naturæ* were identical, Grotius, with his immediate predecessors and his immediate successors, attributed to the Law of Nature an authority which would never perhaps have been claimed for it, if "Law of Nations" had not in that age been an ambiguous expression. They laid down unreservedly that Natural Law is the Code of States, and "thus put in operation a process, which has continued almost down to our own day, the process of engrafting on the international system rules, which are supposed to have been evolved from the unassisted contemplation of the conception of Nature. There is, too, one consequence of immense practical importance to mankind, which, though not unknown during the early modern history of Europe, was never clearly or universally acknowledged till the doctrines of the Grotian school had prevailed. If the society of nations is governed by Natural Law, the atoms which compose it must be absolutely equal. Men under the sceptre of Nature are all equal; and accordingly commonwealths are equal, if the international State be one of nature. The proposition that independent communities, however different in size and power, are

Sir Henry Maine on this.

Doctrine of the Equality of States based on Roman Law.

all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age. It is a doctrine which probably would never have obtained a secure footing at all, if International Law had not been entirely derived from the majestic claims of Nature by the Publicists, who wrote after the revival of letters"*.

Sir Henry Maine proceeds to show "how small a proportion the additions made to International Law since Grotius's day bear to the ingredients which have been simply taken from the most ancient stratum of the Roman *Jus Gentium*." He points out how modern Publicists have simply transcribed the part of the Roman Law which treats of the modes of acquiring property *jure gentium*, and how those parts of the international system which refer to ownership or *dominion*, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law. He demonstrates also the Roman origin of the theory, "that a State's sovereignty must have in it the element of territoriality;" that is to say, it is always associated with the proprietorship of a limited portion of the earth's surface.

Treaties, ancient Manifestoes, and other State Papers.

90. Another class of repositories of means of knowledge of this subject consists of Treaties, ancient Ordinances, State Proclamations, Manifestoes, and the like. A Treaty is, primarily, direct evidence of an agreement between two or more States to do or not to do certain things; but besides this, it may have

* Maine's 'Ancient Law,' p. 100.

indirectly a very important and extensive operation as evidencing principles and rules of positive International Law. This proof may be given not merely by its express covenants, but even more strongly by its recitals; and also by its very phraseology, as showing the consent of nations to adopt a particular interpretation of a particular term*. Of course, in matters like these it is desirable to show the *consensus* of as many Treaties as possible; but even a single Treaty may give weighty testimony. For "there are certain great and cardinal treaties, in which, after long and bloody wars, a readjustment of International relations has taken place; and which are therefore more especially valuable, both from the magnitude and importance of their provisions, which have necessitated a recurrence to, and a restatement of the fundamental principles of International Law, and also from the fact that frequently the greater number of European States, and lately some American and even Asiatic communities, have been parties thereto"†.

Indirect effect of Treaties as Evidence of Consuetudinary Law.

91. The Proclamations, Manifestoes, and Ordinances of Princes and other ruling powers in States on subjects arising out of their relations with other States, are materials from which inferences as to the existence of an International *Consuetudo* may be drawn; and there are ancient collections of Maritime usages which give evidence of very early general practice, and, thereby, of very early consuetudinary law as to many subjects of permanent importance‡.

Proclamations, Manifestoes, &c.

* 1 Phillimore, 45.

† Ibid. 47.

‡ Travers Twiss, vol. i. pp. 125, 127.

Historical study indispensable.

92. Perhaps the study of these documents, and also that of Treaties, may be regarded as forming part of the study of history,—a study which is absolutely essential for the acquisition of clear knowledge and for the just appreciation of International Law. All History is instructive; but some portions of it are far more so, especially to the Jurist, than other portions. Modern History, from the close of the Thirty Years' War by the Peace of Westphalia, down to the present time, must be thoroughly known by him; and he can hardly devote too much attention to the study of the "Cardinal Treaties," which have been already alluded to in a quotation from Phillimore. Koch's History (continued and edited by Schoell) of Treaties of Peace between the European Powers, beginning with the treaties of Osnabruck and Munster (called generally the Peace of Westphalia), is a work of very great value to the International Lawyer, as well as to the Historian and Diplomatist. It will be better understood and valued after a careful preliminary study of Heeren's 'Manual of the History of the Political System of Europe and its Colonies, from the close of the 15th Century.' A complete and very ably written list of the most important treaties since the Reformation, with brief statements of their provisions, is given by Mr. Woolsey in an Appendix to his 'Introduction to the Study of International Law'*.

Modern History from Thirty Years' War specially important.

History of Treaties by Koch and Schoell.

Heeren's Manual.

Histories of International Law.

93. Expositions of International Law, such as the present book aspires to be, usually include an historical account of the rise and progress of Interna-

* Page 371, edit. of 1874.

tional Law. To examine the subject thus historically is a very advantageous method of learning it; and the careful reader of Wheaton's 'History of International Law,' supplemented by the excellent Commentary which Mr. Lawrence is now gradually publishing, cannot fail to be greatly benefited. But it is best to take the history of this law as a distinct line of study, and not to mix it up with our preliminary survey of the present fabric of this department of Jurisprudence. If, however, any student of our subject in this last-mentioned form (the form in which it is considered here) feel that he would comprehend it more clearly, if he had some general knowledge as to the traces in early history of the existence of a law or laws between independent nations, and of the gradual development of such law or laws, he will find a brief but clear sketch, such as he desires, in Sir Robert Phillimore's Preface; to which he should add the remarks of the same writer at page 16 of his first volume, as to the extent to which such a law was recognized by the Greeks and Romans. The same volume contains also a valuable appendix, in which this subject, so far as regards the Romans, is examined more in detail*.

* I would only venture on the additional remark that the paucity of passages professing to set out International Law, which we notice in the Corpus Juris, ought not to surprise us, if we remember from what sources the Institutes, Digest, and Code of Justinian were directly taken. They were almost entirely compiled from treatises written by the great Jurists who flourished during the era of the Antonines, or during the reigns of those emperors who very nearly preceded or succeeded the Antonines. When these Jurists were writing, Rome had been, from one to two centuries, sole

Diversity of opinions of Publicists.

94. To sum up an answer to the practical question of "Where is the modern student or politician to seek information as to practical Positive International Law?"—he may be told that his readiest mistress, not indeed of the whole world, but of almost the whole civilized world, as it was then known to the Romans. Parthia is a mere nominal exception. The case had once been widely different. But the numerous independent states of Italy, with which the young Roman Commonwealth grappled, the still more important states and empires round the further coasts of the Mediterranean and its connected seas, with which the matured Roman Commonwealth maintained dealings of peace and war, had all perished by the time of the commencement of the Imperial reign of Augustus Cæsar. As Ranke has said, "The self-governing powers that had filled the old world had bent one after another before the rising power of Rome, and had vanished. The earth seemed left void of independent nations." Gaius, Modestinus, Papinian, Ulpian, and their contemporaries, who, like them, wrote on Roman Law for the Romans of the empire, could have had no motive, such as Coruncanius, Scævola, and other Jurisconsults of the Republic must have had, for teaching that "præstabilem scientiam in fœderibus, pactionibus, conditionibus populorum, regum, exterarum nationum, in universo denique belli jure et pacis," which was regarded as the fitting accomplishment of a Roman Statesman down to the last age of the Commonwealth, as may be seen in Cicero's Oration "Pro Lege Manilia." But this eminent lore, this "Præstabilis Scientia" of these elder Jurists was allowed to fall into oblivion by the practical Romans, when it ceased to be practically important.

What has been written here is by no means inconsistent with what has been quoted elsewhere in the text, as to the extent to which Grotius and others built up modern International Law out of Roman Law. They did this by transferring to Nations what the Roman Jurists had written about Individuals.

If Julius Cæsar's project of forming a code of Law had been completed in his time, we should have found in it a great deal of *direct* International Law, such as Pompeius was celebrated for knowing.

and primary source of instruction will be found in Text-writers of general reputation. But *Doctores Juris* as well as *Doctores Medicinæ* frequently disagree; and if the reader wishes to judge for himself, he must have recourse to the other means of knowledge that have been mentioned, to the study of history, of treaties, and of Roman Law. And yet all these, even if they all are comprehended, are not all-in-all sufficient. Difficulties and discrepancies will often beset the comparer of even the best authorities; and the course of actual events will from time to time bring forward new questions for decision, as to which no express precedent or guide can be found, and which therefore must be viewed, if possible, by analogy, and should be regulated by general principle. It is here that a sound knowledge and a full sensitive appreciation of Moral International Law is preeminently valuable. He whose head and heart are thoroughly imbued with the canon of Montesquieu, with the three Ulpianic Rules, with the rule as to keeping Faith, and with the Solonian maxim, which have been set forth and commented on in a preceding chapter*, will hardly be at a loss for a right spirit of Interpretation when ambiguities are to be dealt with, or for true Ideal types of excellence when novelties in Positive Law must be moulded. Above all, a Compass, by which he may both discern for himself and may demonstrate to others the best lines of action, will be found in the true principle of Utilitarianism, that of considering how any proposed law

Frequent difficulties of the subject.

New cases, new doubts.

Need of General Principle.

Value here of Moral International Law.

It is Hermeneutic for present Positive Law, and Typical for future Positive Law.

Special value of Utilitarian Principle.

* See p. 44, *suprà*.

of conduct will, if observed as a law, promote or thwart the good of all who will be affected by it. In a very memorable State Paper of the last century, which foreign as well as English Jurists have concurred in eulogizing*, The Law of Nations is stated to be "founded upon justice, equity, *convenience*, and *the reason of the thing*, and confirmed by long usage." "Convenience and the reason of the thing" describe the Utilitarian principle.

* Reply of the British to the Prussian Government, 1753.

CHAPTER VI.

What constitutes a State?

Independence—what kind and amount of is necessary.—Case of native Indian Princes.—Organization necessary.—Particular form of it immaterial.—Changes immaterial.—Temporary anarchy.—Numbers.—Territoriality.—Equality of States.—Leading Powers.—The Pentarchy.—The Monroe Doctrine.—Titles.—Maritime Honours.—How far International Law applies to non-Christian and to imperfectly civilized communities.

Main attributes of a State recapitulated, see paragraph 9 *et seq.*

95. It has already been mentioned in this treatise that for the purposes of International Law, 1st, a State means a Sovereign State—that is to say, an Independent Political Society; 2ndly, that a State must have its own organized Government; 3rd, that the form of such Government is for purposes of International Law immaterial; and 4th, that a State is a Moral Agent. It will be convenient now, before we classify the rules of International Positive Law, to examine the attributes of a State a little more minutely. First, then, Of Independence.

Question proposed, What amount of Foreign Influence deprives a State of the Attribute of Sovereignty?

96. What kind and amount of Independence must a Political Society possess in order that it may rank as a Sovereign State? This may be best answered by examining the converse proposition, "How far must a State be under the influence of another State for it to lose the character of a Sovereign State?"

Indirect Influence not enough to destroy State-sovereignty.

97. Every State, however powerful, is to some extent influenced by the authority of other States. Regard to public opinion, and the wish not to create a general inimical feeling against itself, will almost always have some practical operation. But it is evident that this does not make a great and powerful State, such as Russia, Germany, France, or England, cease to be independent and Sovereign. On the other hand, there may be a large territory with a dense and wealthy population, accustomed to obey in all matters of internal Government their native prince; and that prince may keep up the most exalted style and sumptuous pomp of royalty; he may levy his own troops, and may nominate the holders of offices, both civil and military; but yet this Prince may live under the perpetual control of a foreign Ruler, who will not allow him to make peace or war, or to enter into diplomatic relations with third parties. Moreover this foreign Ruler may systematically watch the general character of the native Prince's government, and may have the will and the power to depose him if he grossly misconducts himself, the foreign ruler being the judge both of the existence and extent of such misgovernment.

Titular Independence no sovereignty, if coupled with actual subjection.

Native Princes of India.

98. Such is the condition of the native Princes of India. We all see clearly in them and in their subjects not independent political communities, which are Sovereign States in the eye of International Law, but mere subordinate members of the larger and paramount Political Society, the true Sovereign State, the British Empire.

99. But, on the other hand, so long as a State retains in fact as well as in theory the right of making treaties and of entering generally into diplomatic relations with other States, and the right of making peace and war at its own discretion, and without being controlled by any foreign authority, such State will not cease to be regarded as a Sovereign State for purposes of International Law, though corruption, bribery, and fear of force may have made the State (that is to say, those who administer its government) subservient to a foreign power, as Spain was to France seventy years ago, during the administration of Godoy. A State may even profess feudal vassalage to a foreigner, as Naples was the professed vassal of the Holy See from the eleventh century to 1818*; a State may avow itself to be under foreign protection; it may even pay tribute; but if it holds its own as to making war and making peace, and as to general negotiations and diplomacy, the State is not, as a State, out of the pale of International Law†.

* See Wheaton, 'Elements,' vol. i. p. 49.

† In Austin's 'Jurisprudence,' pp. 201–208, will be found some very valuable remarks on the amount and *habit* of obedience which one State must render to another, before it loses the character of an Independent State. He takes the instance of the kingdom of Saxony and its relations to the Foreign Sovereigns who, at the time when Austin wrote, formed the Holy Alliance. He says:—"A feeble State holds its independence precariously, or at the will of the powerful states to whose aggressions it is obnoxious. And since it is obnoxious to their aggressions, it and the bulk of its subjects render obedience to commands which they [the powerful foreign states] occasionally express or intimate. Such, for instance, is the position of the Saxon Government and its sub-

100. It has been mentioned that a State must, in order to be recognized as such Internationally, have its own organized Government.

jects in respect to the conspiring sovereigns who form the Holy Alliance. But since the commands and the obedience are comparatively few and rare, they are not sufficient to constitute the relation of sovereignty and subjection between the powerful states and the feeble state. In spite of these commands, and in spite of that obedience, the feeble state is sovereign or independent." General Halleck, p. 66, points to a stronger instance in the case of the city of Cracow, as it existed for a time. He says:— "The city of Cracow in Poland, with its territory, was declared by the Treaty of Vienna in 1815 to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia. Although its councils were habitually influenced by these great powers, it was nevertheless regarded in International Law as a Sovereign State; and when, by the Convention of 1846, it was annexed to the empire of Austria, the Governments of Great Britain, France, and Sweden protested against the proceeding as a violation of the Act of 1815, by which it was recognized as an independent State." With regard to Tribute and Vassalage, he adds:—"Tribute like that paid by the European maritime powers [of the Mediterranean] to the Barbary States does not necessarily affect the sovereignty of the tributary; nor does the acknowledgment of a nominal vassalage or feudal dependence, like that of Naples to the Papal See prior to 1818, necessarily impair the sovereignty of the Vassal State. Its position in the eye of international law is not necessarily affected by its connexions of this kind with others. The law regards the *fact* of sovereignty rather than the mere name by which it is designated."

This last-mentioned is the same principle. Sir R. Phillimore inculcates it emphatically.

"The proper and strict test to apply will be the capacity of the Protected state to negotiate, to make peace or war with other States, irrespectively of the will of its protector. If it retain that capacity, whatever may be the influence of the protector, the protected State must be considered as an independent member of the European Commonwealth.

"It must, however, retain

We have already considered the principle that the Community must be free from the rule of any foreign

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this capacity *de facto*, as well as *de jure*; and it is necessary to make this observation because, at no distant period of history, an attempt was made to evade the application of this principle of law, by retaining theoretically the name when the substance was practically and notoriously lost. The Swiss Cantons and the States forming the Confederation of the Rhine, to say nothing of other countries, were nominally free and independent when their armies were under French officers, their cabinets under French ministers, and their whole constitution entirely subject and subservient to their French ruler and protector Napoleon. They were therefore justly considered by International Law as provinces of France, and were denied the rights of independent States during the continuance of this state of subserviency."

Sir R. Phillimore adds, p. 93, that "States which cannot stand this test, which cannot negotiate, declare peace or war with other countries without the consent of their protector, are only mediately and in a subordinate degree considered as subjects of International Law. In war they share the fortunes of their protectors; but they are for certain purposes, and under certain limitations, dealt with as independent moral persons, especially in questions of Comity, touching the persons and property of their own subjects in a foreign country, or of strangers in their own territory, and with respect to other matters of the like kind.

States of this description are sometimes, but with admitted impropriety of expression, called semi-sovereign (demi-souverain, halbsouverain)."

As to the case of the community of Cherokee Indians, who live in a territory of their own within the boundaries of Georgia, who have made numerous treaties with the United States and regulated their own affairs, see Kent's 'Commentaries,' vol. iii. 382, and Wheaton, 'Elements,' vol. i. p. 50. It appears that, before the War of Independence, the British authorities interfered with the self-government of these Cherokees in one matter only; but that one matter was a very important one. The British took care not to allow the residence or visits of any foreign agents, who might draw the Cherokees into alliances with powers that were the

body; we must now go a little further, and we shall see that not only a State must be free from government by others, but it must govern itself*. A horde of men in a condition of anarchy, or having merely such organization as is available for destructiveness (like that of pirates or brigands), cannot be a State, however free it may be from all extraneous control. Cicero's maxim as to this (quoted by Sir R. Phillimore, vol. i. p. 78) is generally recognized: "Populus autem non omnis hominum cœtus, quoquo modo congregatus, sed cœtus multitudinis *juris consensu et utilitatis communione sociatus*"†. In Austin's 'Jurisprudence'‡, it is pointed out that in order for a given

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enemies or rivals of England. It may be safely assumed that the United States would exercise the same caution and prerogative, if it seemed necessary for their interests. Under such circumstances, the Cherokee Community cannot be regarded as a Sovereign State, however honourably and conscientiously the United States may respect its rights as to ownership of territory, legislation, and other internal matters.

* In the case of Yrisarri *v.* Clement (2 C. P. 225, cited in Taylor 'On Evidence,' vol. i. p. 3), States are defined as "Associations formed for mutual defence, supporting their own independence, making laws, and having courts of Justice."

† De Republicâ, lib. 1. p. 25. Again, in the 4th Philippic, when speaking of the kind of enemies who are entitled to the rights of War, Cicero defines such an enemy as being one "qui habet rempublicam, *curiam*, *ærarium*, consensum et concordiam civium; rationem aliquam, si res ita tulisset, pacis et fœderis" (see Wheaton, 'Elements,' vol. i. p. 50). Wheaton applies this test to the Barbaresque Powers. See, in Lawrence, 'Commentaire sur Wheaton,' t. 3. p. 132, the remarks of the American Statesman, Mr. Marcy, on the character of the community of Greytown in 1854.

‡ Vol. i. pp. 227–230.

society to form a society political, habitual "obedience must be rendered by the bulk of its members to one and the same determinate person, or determinate body of persons. Unless habitual obedience be rendered by the bulk of its members and be rendered to one and the same superior, the given society is either in a state of nature, or is split into two or more independent political societies."

101. What effects a civil war, which so splits up a State, has on the relations of other States with it, is a difficult and important question to be considered hereafter, when we come to consider the rights and duties of Belligerents and Neutrals. For the present we will pass on to another maxim, as to what constitutes a State.

102. The form of a State's government is, in the eye of International Law, absolutely immaterial. In other words, so long as a community has a political organization or Government, which the bulk of its members obey, and so long as this organized Government has a visible appointed chief organ for the purposes of communication with other States, other States have nothing to do with the kind of internal political organization which is to exist in the State in question.

103. So many eminent writers on our subject have clogged their pages with disquisitions about Democracy, Aristocracy, Monarchy, and their relative qualities and influences, and we all have such a tendency to carry our party politics into our literary and scientific pursuits, that the student of International Law cannot be too speedily or too strongly

International Law has nothing to do

with the comparative merits or demerits of Monarchy, Aristocracy, or Democracy, or of any polity whatever. Distinction between the external and the internal life of a State. International Law affects only its external life.

warned that all such topics are foreign to his subject, and that, if they are introduced, they must bring with them confusion and error. International Law affects the *external* life of a State, and that only*. Even as the external life of an individual person is made up of that person's dealings, either friendly or inimical, with other persons, so the external life of a State is made up of the State's dealings, either pacific or hostile, with other States. Each, the State and the individual person, has also its internal life, which is made up of its constitutional and private affairs within the immediate sphere of home. All questions about how a State is governed, as to its being a Monarchical State, or an Aristocratic State, or a Democratic State, are questions that affect its internal life only, and are not within the pale of International Law. It is not meant by this to require that the human beings who are members of one State, should view with indifference the political and social condition of human beings who are members of another State. Like will cling to like; and men who are zealots for a political principle in their own land, will sympathize with its champions or its martyrs in another land. Such considerations also may fairly influence the policy, which a State will observe in its external dealings, when more than one course may be taken by it without any violation of International Law. But none of these things can give any International

The sympathizing of human beings in one country with human beings in another country as to political matters may and must exist, and may rightfully affect a State's choice out of several lawful lines of policy towards another State. But international rights and obligations cannot be created, or nullified, or controlled by such things.

* Private International Law, which is a seeming, and only a seeming exception to this principle, will be considered in the latter part of this treatise.

claim, or can diminish any International obligation. The State, that comes into contact with other States, is bound to observe the great rules of International Law towards them with equal exactness and loyalty, whether their political institutions differ most widely from its own, or whether they resemble them closely. As we have seen, every State must, in order to be recognized as such, have its own organized government, and every such government must have its appointed chief organ. Whether this chief organ be an Emperor, or a King, or a Sultan, or a President, or a Consul, or a Senate, or a popular Assembly, or any combination of ruling individuals or ruling bodies, that organ, as the State's chief organ, is to foreign bodies the visible and practical Impersonation of the State, with which they, through their own respective chief organs, communicate, and the acts of which are, in the eye of International Law, the acts of the whole community. The person or the persons which is or are the chief executive organ of a State in fact, must, for International purposes, be always assumed to be the chief executive organ as of right; and no inquiry into the rightfulness of its or their authority is, for International purposes, admissible. The common security of States requires the rigid maintenance of this principle. Without it, no treaty could be made or enforced until each contracting party had satisfied itself as to the mode in which the internal politics of the other were regulated, and there could be, practically, no general system of International rules, on which each member of the great Commonwealth of Nations could rely

States regard the chief governing organs of each other as the practical impersonations of States, for international purposes.

For international purposes every government *de facto* is a government *de jure*.

Practical necessity of this rule.

amid their infinite variety of political and social institutions, and amid the frequent internal changes to which each is individually liable *.

A change in the form of government of a State does not vary the State's international rights or duties.

104. The next maxim, that a change in the form of government of a State does not vary the State's International rights or duties, is intimately connected with the last maxim, that the form of government of a State is immaterial for purposes of International Law. It is, indeed, a mere corollary on that proposition; nor would it be given here as a distinct maxim, if it were not that we occasionally hear vehement zealots for the glory and aggrandizement of their particular country assert, when that country has revolutionized its government, that it ought not to be any longer bound by the compacts which an expelled dynasty has made with other States. But it is self-evident that if once it were to be conceded that a State, by changing its form of government, could change its external rights and obligations, we must

This a corollary on the last (the third) maxim. Attempts made to deny it.

* Bluntschli says, ('Le Droit International Codifié,' p. 62), "Le Droit International organise les divers États, monarchiques ou républicains, représentatifs ou absolus, grands ou petits, en associations juridiques et humanitaires. Il n'exige pas une constitution spéciale, ou une certaine étendue de territoire. Partout où un peuple, administré par un gouvernment, est devenu, sur un territoire déterminé, un tout, offrant des garanties suffisantes de stabilité, il est considéré comme un État par le droit international."

President Woolsey's remarks on this subject are as follows:—"A State may sustain relations to other States, and perform its offices generally under any form of government. The Law of Nations preserves an entire indifference to Constitutions, so long as they do not prevent fulfilment of obligations. Every State is in its eye legitimate."—P. 54.

reverse the last maxim which we have been examining; and we must then consider the form of a State's government to be most material for purposes of International Law. Suppose, for example, that England had a treaty with France, which was concluded when France was under a Monarchy. If France, by making herself a Republic or an Empire, acquired an International right to repudiate that treaty, England, and other States similarly circumstanced as to France, would have a deep International interest (an International interest of right and obligation, and not a mere human interest of sympathy or dislike) in every change of the French government. Indeed the strict consequence would be, that France would commit an International wrong, if she changed her own form of government, unless she did so with the consent of every Foreign Power with which she had any treaty existing. Work such a principle out, and it will be seen how it would apply to ourselves. We should then have no right to alter materially our Parliamentary system, to make it more or less Democratic or Aristocratic, without the leave of all our allies. Innumerable other instances might be suggested, all of which would demonstrate the mischievous absurdity of holding that a State's rightful relations with other States can be varied by the State varying its own institutions. The State's visible supreme chief executive organ may change its form, may change its name, may change its inner nature; but to Foreign States it is, *for* purposes of International Law, one and the same, and its authority to act in behalf of the

The mischief that would result if such attempts succeeded.

whole State is one and the same, so long as the State continues to have any chief organ of government at all—that is to say, so long as it continues to be such a community as is recognized by International Law as constituting a State.

Authorities on this subject.

105. Many authorities on this subject might be cited. Among them are the dicta of D'Aguesseau*, Montesquieu†, Grotius‡, Heineccius, Vattel§, Bynkershoek, Puffendorf, Wheaton and Kent, as quoted by Sir R. Phillimore in his valuable chapter VII. (vol. i. p. 148), where this doctrine is fully enounced, and by Heffter‖.

106. General Halleck's observations¶ on this subject are as follows:—

"As a general rule a mere change in the form of government, or in the person of the ruler, does not affect the duties and obligations of a State toward foreign nations. All treaties of amity, commerce, and *real* alliance, remain in force precisely as if no intervening change had taken place, except in cases where the compact relates to the form of government itself, or to the person of the ruler in the nature of a guarantee. Public debts, whether due to or from the revolutionized State, are neither cancelled nor affected by any change in the constitution or internal government of a State. So, also, of its public domain and right of property.

* i. 493, s. 4.

† Esprit des Lois, i. xxvi. cxx.

‡ Lib. 2. c. ix. s. 8; Lib. 2. c. xvi. s. 16.

§ Lib. 2. c. xii. s. 191; c. xiv. s. 215.

‖ Droit International, s. 24.

¶ Page 77.

If a revolution be successful and a new constitution be established, the public domain and public property pass to the new government. The State, on the other hand, remains responsible for the wrongs done to the government or subjects of another State, notwithstanding any intermediate change in the form of its government or in the persons of its rulers. These results flow necessarily from the principle that the identity of a State is preserved, notwithstanding the accidental changes in its internal constitution."

107. The distinction adverted to in this passage between Real Treaties and Personal Treaties* will be discussed in a subsequent chapter on the subject of treaties. I will here quote one more passage from a recent writer on the very important point which we have been considering—important practically as well as theoretically†. Bluntschli says (pp. 73 & 74), 'L'État reste la même personne en droit international, lors même que sa constitution est tantôt monarchique, tantôt républicaine, ou qu'il est, pendant une période, gouverné constitutionnellement, et après cela autocratiquement. Ses droits et ses obligations vis-à-vis des autres états n'en subsistent pas moins. Le maintien des traités ne dépend pas du maintien des gouvernements qui les ont conclus. * * Le principe

Bluntschli's comments on the continuing personality of a State *ad exteros*, notwithstanding internal changes.

* See as to them Vattel, l. 2. c. 12, s. 183 *et seq.* Sir R. Phillimore, vol. ii. p. 71 *et seq.*; and Martens, p. 54.

† See Sir R. Phillimore's remarks (vol. i. p. 152) on the attempt made by Lamartine to disavow the Treaty of Vienna, as not binding upon the new French Republic of February 1848, because it had been made by a Monarchical Government.

moderne a été formulé par les cinq grandes puissances à Londres, le 19 Février 1831, 'D'après ce principe d'un ordre supérieur les traités ne perdent pas leur puissance, quels que soient les changements qui interviennent dans l'organisation intérieure des peuples.'"

In another part of the same work he very forcibly illustrates the proposition that "the State is represented *ad externos* by him '*Qui actu regit*,' qui a de fait la direction des affaires. Celui qui arrive au gouvernement d'un pays, est, par suite, considéré comme l'organe et le représentant de l'état. On peut conclure avec un usurpateur victorieux et reconnu par son pays des traités obligatoires." He adds the not unimportant remark, that "De la circonstance qu'un état entre en relations régulières avec le gouvernement établi de fait dans un autre état, il ne résulte pas que le premier reconnaisse la légalité du second. On indique seulement par là que on reconnaît à ce gouvernement l'autorité et les moyens nécessaires pour se faire respecter et pour agir avec efficacité." This doctrine that International Law recognizes all rulers *de facto* (with the qualification that no moral approbation of the means whereby their rule has been acquired is implied by such recognition), has been admitted by even the Papacy. "L'Eglise Romaine, malgré ses tendances légitimes actuelles, a reconnu la même maxime. Le Pape Grégoire XVI. a déclaré solennellement, en Août 1831, que c'était un besoin et un ancien usage de l'Eglise, d'entrer en rapports avec ceux '*qui* ACTU *summâ rerum potiuntur*:' mais en même temps qu'elle n'entendait pas recon-

Even the Papacy recognizes *Rulers de facto*.

naître par là la légitimité des pouvoirs de ces derniers "*.

* Bluntschli, pp. 112, 113. Mr. Dudley Field, at page 11 of his 'International Code,' Article 19, lays down the rule as follows:—"A change in the form of its government, or in its dynasty, does not affect the continuity of existence of a nation or its property; nor does it affect its rights or obligations in respect to other nations or their members; except so far as such rights or obligations are necessarily dependent on the continuance of the old form of government or dynasty." His comment on his rule runs thus:—"This rule is especially important in its application to national debts. The only questions of real difficulty arising out of the general rule are those which spring out of insurrections. The case of 'The King of the Two Sicilies *v.* Wilcox' (1 Simon's Reports, N. S. 301), establishes the principle that where a *de facto* government has, as such, obtained possession of property, the Government which displaces it succeeds to all its rights." With regard to the exception introduced by him at the end of his rule, Mr. Dudley Field says, "For instance, a compact between two republics to protect each other in a republican form of government would be terminated by the final establishment of a Monarchy in one or both."

With respect to M. Bluntschli's observations, that Foreign Powers, by entering into diplomatic relations with a new Government, are not held to express any approval of its origin or character, it is to be noticed that such recognition of mere existence is always eagerly sought for by the new authorities, and as earnestly deprecated by the partisans of the displaced rulers. Spain at the present time gives an instance of this. The truth is, that however rigidly Foreign Powers may limit their recognition to admissions of facts, such recognition gives the new Government a great increase of moral force, and materially improves the light in which it is regarded by nations as well as by foreigners. "La reprise des relations diplomatiques et le fait d'accorder certains titres impliquent, du reste, la reconnaissance du gouvernement *de fait*. Celle-ci exerce une certaine influence sur le droit, car elle diminue ou lève complétement les doutes qui auraient pu subsister sur l'existence de l'ordre de choses

Temporary Anarchy of Revolutionary and Civil War.

108. It has been pointed out that the existence of some kind of organized and settled government is essential for the International existence of a State. During the doubtful struggles and the vehement vicissitudes of fortune which civil wars commonly display, it is often difficult and sometimes impossible to say what superior authority, if any, the bulk of the community habitually obeyed*. And even when the

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nouvellement établi."—Bluntschli, p. 112.

A subject closely akin to this will be discussed in another part of the present work, in which will be considered the rules as to the recognition of Belligerency and of Independence.

The futile attempt of the Holy Alliance to ignore all States of revolutionary origin will be spoken of presently.

* Austin (p. 211) puts the following case :—"During the height of the conflict between Charles the First and the Parliament, the English nation was broken into two distinct societies; each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, was a common government completely reestablished? Or at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the *bulk* of the nation were *habitually* obedient to the body which affected sovereignty? and after the conflict had subsided, and until that juncture had arrived, what was the class of the society which was formed by the English people? These are questions which it were impossible to answer with certainty, although the facts of the case were precisely known."

military and political chiefs of one of the contending parties have compelled all others to lay down their arms, and to profess obedience to the victors, the elements of change and reaction, or of discord and new civil war between the conquerors themselves may be seething in such manifest potency that it is impossible to feel confidence in the stability of the newly established order of things. Under such circumstances no foreign State is bound to recognize formally the new Government, though it may keep up amicable relations with the community which it is ruling.

109. Such a temporary condition of anarchy or of anarchical instability does not destroy the continuity of a State's existence; it only suspends its natural action*. When the State acquires reorganization, its old life is rehabilitated and proceeds.

States' continuity of existence survives.

110. When an old Government is restored after the temporary prevalence of an imperfectly settled Revolutionary Government, or of a series of such Governments, difficult questions often arise as to the effect of such *restoration* upon the acts of State of the intermediate rulers. These difficulties usually occur in matters which affect members of the State itself—that is to say, in matters of Constitutional Law, and not of International Law. But they sometimes materially affect Foreign States. It is impossible to lay down

Questions arising on a Restoration.

* L'état ne cesse pas pour cela d'exister, pas plus qu'un homme ne perd sa qualité d'homme, lorsque la fièvre ou le délire troublent momentanément ses facultés."—Bluntschli, p. 13. Dudley Field, Article 20 of 'International Code,' says, "A temporary condition of anarchy does not affect the continuity of existence of a nation."

any system of fixed rules for their solution. Generally speaking, it will be necessary to have regard to the length of time during which the revolutionary power-holders bore sway; to the nature of each act, and to the object with which it was designed, as well as to the results of its being carried into execution*.

Dispossessed rulers no longer recognized.

111. As he who gains the *de facto* rule of a State becomes its representative in International Law, he who loses such rule loses such representative character also. Dethroned Princes have often made treaties with foreign States, which treaties would, if enforced, materially affect those Princes' own countries. But such treaties are, in respect of those countries, absolutely void. "Celui qui perd le gouvernement d'un état, cesse de représenter cet état à l'extérieur. On ne peut pas conclure avec un prince détrôné des traités obligatoires pour l'état. Celui, qui n'est plus souverain, étant hors d'état de gouverner, ne peut plus représenter l'état. Il serait absurde de prétendre qu'un peuple pût être lié par les actes d'un prince qui ne possède aucun pouvoir sur ce peuple, et est incapable d'assurer l'exécution de ce qu'il a promis"†.

Are considerable numbers of population, and is landed property essential to the existence of a State?

112. Returning to our immediate subject of "What constitutes a State?" we will consider whether it is essential that the population of a political community shall consist of any minimum number, in order for it

* See on this subject Lawrence, 'Commentaire sur Wheaton,' vol. i. p. 214; Bluntschli, p. 74; Heffter, pp. 356, 361, 362; Phillimore, vol. iii. p. 700; Halleck, p. 840.

† Bluntschli, p. 113.

to be regarded as a Sovereign State; and also whether the possession and ownership of territory by the political community in question is essential for its having the character of a State.

113. First as to numbers.

As to numbers. Opinion of Austin.

114. Mr. Austin, in his work on Jurisprudence*, arrives at the following conclusion:—"A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural* and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior."

And arriving at that conclusion, we must proceed to this further conclusion:—In order that an independent society may form a society political, it must not fall short of a *number* which may be called considerable.

"The lowest possible number which will satisfy that vague condition cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or exceed not a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies than one independent community under a common sovereign. Now

* Vol. i. page 237. See the comments of Sir Henry Maine, 'Early History of Institutions,' p. 378.

the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands; and the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds."

Of Montesquieu.

115. In another part of the same work he cites Montesquieu's opinion, that the union of a number of families is essential for the existence of a political society. "La puissance politique comprend nécessairement l'union de plusieurs familles."

Of Heffter.

116. Heffter says that a State must be "Une société assez nombreuse, et capable d'exister par elle même, et dans l'indépendance"*.

Territory. Opinion of Austin.

117. With respect to territory, Mr. Austin says, "Generally speaking a society political and independent occupies a determinate territory. Consequently, when we imagine an independent political society, we commonly imagine it in that plight. And, according to the definition of independent political society which is assumed expressly, or tacitly, by many writers, the occupation by the given society of a determined territory or seat is of the very essence of a society of this kind. But this is an error. History presents us with societies of the kind which have been, as it were, *in transitu*. Many, for example, "of the barbarous nations which invaded and settled in the Roman Empire, were not, for many years before their final establishment, occupants of determined seats"†.

I believe these remarks of Mr. Austin to be

* Page 36. † Vol. i. page 345, note.

quite right. How it was that the great founders of the modern schools of International Law, Grotius and others, introduced the doctrine that Sovereign States must have territorial sovereignty, that proprietorship over some portion of the earth's surface is an essential element for the existence of a "Civitas," will be found admirably explained by Sir Henry Maine in the concluding part of his fourth chapter on Ancient Law, which has been already referred to in this volume*.

Question may seem practically immaterial.

118. The question may appear immaterial, as a condition of things like that which prevailed in Western Europe for some centuries during and succeeding to the downfall of the Roman Empire is not likely to recur. But something of the kind may yet happen. Suppose, for example, that the members of the Independent Republic now located near the Orange River to the north of the eastern part of our Cape colony were to determine to abandon their present habitations and to migrate to some new home on the African coast of the South Atlantic. Before they were thoroughly settled in their new homes they would probably come into contact with our colonists in the north-western provinces of Cape colony, on the frontiers of Calvinia, or of Namaqualand. Now, if this still-migrating community retained their organization as a political community, and observed the usages of International Law and comity towards us, it would, I apprehend, be our duty to treat them as a Sovereign

But it may recur.

* Page 86, note.

State, though not holding for the time any definite territory as their own dominion*.

Equality of States.

119. If an independent, organized political community has the qualification of sufficient numbers, which has been recently spoken of (perhaps also if it is qualified by having some exclusive territorial possession), it is a Sovereign State for purposes of International Law; and its rights as such are not augmented by any increase of population or territory.

Equality before the Law, the *Ἰσονομία* which the ancient Greeks regarded as the special characteristic of a commonwealth having full internal freedom†, is thoroughly recognized in the commonwealth of States by International Law. One of the fundamental principles of Public Jurisprudence is, in Lord Stowell's words, "the perfect equality and independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized on that ground is mere usurpation. This is the great foundation of Public Law, which it mainly concerns

Lord Stowell's declaration.

Equality the foundation of Public Law.

* Bluntschli says that such wandering communities are not States, but that, in consideration of their being politically organized, and having an organ for the expression of the common will through the agency of their chief, or assemblies, they are to be dealt with analogously to States, and can form international treaties (p. 63). See also p. 169 *et seq.* and p. 290.

† So the Roman Jurists acknowledged the equality of all men according to Natural Law. This is declared by Ulpian, as cited in the 50th book of the Digest, "Quod ad Jus Naturale attinet, omnes homines sequales sunt."

the peace of mankind both in their politic and private capacities to preserve inviolate"*.

120. I will place in juxtaposition with Lord Stowell's words the statement of the same doctrine made by the lately deceased American Jurist and statesman, Mr. Sumner, in the Senate of the United States, on the 23rd March 1871. I cite them as they are translated and adopted by Bluntschli in his International Code†. "L'égalité des peuples est un principe du droit international, au même titre que l'égalité des citoyens est un axiome de notre déclaration d'indépendance. On ne doit pas faire à une peuple petit et faible ce qu'on ne ferait pas à un peuple grand et puissant ou ce que nous ne souffririons pas, si cela était fait contre nous-mêmes".

Mr. Sumner's statement of this equality.

121. The doctrine that all States, great and small, powerful and weak, are equal as to rights, is not at all impugned by the undoubted fact that powerful

This theoretical equality of rights, not disproved by practical difference as to power and influence.

* Judgment in the case of "Le Louis," 2 Dod. 243, cited by Polson, p. 25, and Halleck, p. 98. The same principle is stated by Vattel, 'Préliminaires,' sects. 18 and 19; Kent, p. 21 (of 1st vol. of Commentaries); Heffter, 'Droit International,' s. 27; Bluntschli, p. 94; Dudley Field, Code, p. 10; Woolsey, p. 74, and many other authorities.

The importance of the principle is best appreciated when we observe the enormous disparities between the respective populations and resources of different States. Europe alone (according to Mr. Dudley Field in his recent 'Plan d'un Code International') contains eighteen Independent States. Among them are the United Kingdom of Great Britain and Ireland, with its population of more than thirty millions and its vast naval and military resources, and the Republic of San Marino, with a territory about 30 miles long and 20 wide, and an armed force of eighty men.

† Page 94.

States have much the most influence on the affairs of the world, that they can assert their own rights and claims and can control the rights and claims of others very effectively, and that, when the powerful States agree upon a line of general policy, the smaller States generally defer to them and follow their example. This is merely analogous to what we often see in smaller spheres of action. If the four or five great landowners of a rural district meet and agree together as to some local measure, the small squires and yeomen mostly acquiesce in their determination. Such is the case when the four or five great mercantile firms of a trading community combine in joint opinion and action as to some matter affecting the trade of the town. The little shopkeepers hearken and follow suit. In such cases we speak of the importance of securing the votes of the leading landowners or the leading merchants; but we do not mean by it that they are privileged in the municipal courts of law. So when we speak of the leading Powers of the world, or of Europe at any particular crisis, we only mean that they are "*Primi inter pares*;" but their primacy is very substantial. We might, indeed, call each of them a "Primipilus," having regard to the kind of practical arguments by which they are wont to maintain their doctrines.

Leading Powers.

122. Formerly the Empire, the Kingdom of France, and the Kingdom of Spain were looked up to as the great leading political military powers of Europe. England and Holland were usually styled "the Mari-

Former leading Powers.

Maritime Powers.

time Powers"—a phrase that had not become obsolete before the end of the last century*.

123. After the overthrow of the Empire of the First Napoleon the four chief Powers among those that had combined against him, took on themselves to regulate the affairs of Europe without much heed to the opinions or wishes of the minor members of the Commonwealth of European States†. These Four Powers were Austria, Great Britain, Russia, and Prussia. France, under her restored Monarchy, was admitted to this high conclave in 1818; when her Representative, the Duke de Richelieu, took part in

The Pentarchy.

* Martens, writing at Gottingen in 1788, says: "There is another division which, though it depends in some measure on the local situation of States, ought not to be neglected in treating of the law of nations; I mean the division into maritime Powers, and Powers not maritime. It is common enough to call every State maritime that is situated on the borders of the sea and is capable of carrying on commerce on that element; but a maritime Power, properly speaking, is a Power that keeps up a fleet of ships of war; and in this acceptation of the term there are only Great Britain, the Seven United Provinces, Spain, Portugal, the Sicilies, Denmark, Sweden, Turkey, the Republic of Venice latterly France, and, since the beginning of the eighteenth century, Russia, which can be called maritime Powers; the other Powers have either never been maritime or have ceased to be so. But this term, in a more restrictive sense, is applied to those Powers only whose principal strength consists in ships of war, or whose power by sea has a preponderance over that of the other Powers, on the same element. In this double sense England and the United Provinces have, since the end of the seventeenth century, been exclusively distinguished by the appellation of the maritime Powers" (p. 32).

† See Lawrence, 'Commentaire sur Wheaton,' vol. ii. p. 221.

the Congress of Aix-la-Chapelle. Thus was constituted the Council of Five*, which is sometimes termed the Pentarchy†. But there is no magic in the number. An additional State may claim and obtain admission to the list of these "Optimates," these "Majores Barones" of International Hierarchy, if the newcomer acquire such strength, and display such an active spirit in its external life that it cannot be safely disregarded when the settlement of any European question is desired‡.

* "Ainsi se trouva constitué le concile des cinq, qui s'est regardé si longtemps comme souverain et suprême, tant pour les affaires intérieures que pour les affaires internationales de tous les autres États du monde civilisé."—Lawrence, *ib.* p. 229.

† Bluntschli says of the Pentarchy that "L'espèce d'union consolidée à Aix-la-Chapelle en 1818 entre les cinq grandes puissances Européennes, l'Autriche, la France, la Grande Bretagne, la Prusse, et la Russie, n'equivaut pas à la constitution d'un sénat international Européen; on voulait seulement constater par là que les cinq états possédaient alors la puissance la plus considérable, et envisageaient comme leur tâche commune de coopérer à la réglémentation des affaires Européenees" (p. 103).

‡ Bluntschli, p. 104. He refers to the efforts made by the new Kingdom of Italy to obtain admission to the deliberations of the Great Powers. Count Mamiani opposes vehemently the recognition of any such oligarchic clique of States. He says (writing in 1859) that "In France and the other Four Powers above mentioned [*i. e.* Austria, Great Britain, Russia, and Prussia] the decision of European law is lodged in too great a measure. We quite feel the necessity for the powerful and the rich prevailing, as among private persons they do, so among the public, and in the universal commonwealth of mankind no less than in particular cities; and we frankly acknowledge that the history of Congresses previous to that of Vienna abundantly confirms the fact of the arbitrary disposal by the Great Powers of the lot of the lesser. But it is

The Holy Alliance.

124. The league of the four powerful monarchs of Russia, Austria, Prussia, and France, under the title of the Holy Alliance, was organized by the Emperor Alexander I., with declared purposes of a somewhat romantic nature, according to which the legitimate Kings and Princes of the earth were to aid each other in ruling their subjects and soldiers with paternal feelings and Christian benevolence, and in preserving piety, peace, and order. The practical policy (if not the original design) of the Holy Alliance was directed to the armed suppression of revolutionary movements in Europe, and to the forcible maintenance of old despotisms. The Holy Alliance existed for some years collaterally with the Pentarchy; but Great Britain steadily refused to join it, and plainly re-

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the duty of all wise and honest men to endeavour not to let this be assumed as a right, and to see that such an odious and iniquitous privilege as this, which dares not proclaim itself before the conscience of the peoples, shall not, under the name of a convenient and inveterate custom, continue to be maintained.

"This overweening dominion of the European Pentarchy is not, I think, sufficiently palliated by saying that each people is free to accede or not accede to the maxims agreed upon, and to approve or not to approve any deliberations regarding an actual settlement.

"For the dissent of those who are small and weak, even when they take courage to express it, is of little worth or none; and if we search through history we may find huge bundles of their unheeded protests, lying forgotten long ago in the archives of imperial chanceries. On the other hand, the great potentates will not fail in any future convention to allege, as a principle already consented to and universally adopted by European law, that which they betwixt themselves have previously determined and ratified; and, if need be, they will make the most rigid and strenuous application of it."

pudiated its doctrines of forcible intervention. After the death of its founder, the Emperor Alexander, it sank almost into oblivion. More will be said of the Holy Alliance in other parts of this work, where the right, or supposed right, of Intervention is examined.

125. The great Republic of the United States of America, while keeping in general ostentatiously aloof from participation in the politics of the Old World*, has at times assumed the position of the exclusively leading power of the New World; but it cannot be said that either England, France, Russia, or Spain has acquiesced in such predominance; and it is disclaimed by some of the ablest American Jurists and statesmen. According to the Monroe doctrine (so called from the President under whose term of office, in 1823, it was put forward), all interference by European powers with any government in any part of the American continents is denounced as "a manifestation of unfriendly disposition towards the United States;" and the supporters of this doctrine maintain, as a principle in which the rights and interests of the United States are involved, that the "American continents, by the free and independent condition which they have assumed, are henceforth not to be considered as subjects for future colonization by any European power."

The Monroe Doctrine.

Its announcement in 1823.

126. In 1848, President Polk recommended Con-

* An exception will be found in the eager, though unsuccessful, attempts made by the government of the United States in 1849 to effect the recognition of the independence of Hungary as against Austria.

gress to act upon the Monroe doctrine, and to take such measures as might prevent Yucatan from becoming a colony and part of the dominion of any European power. The Congress decreed the levy of a force to occupy Yucatan for a time, and to expel the Indians who had overrun that country. But the scheme was dropped, in consequence of a pacification which the Yucatan government effected with the insurgents. In 1867, after Great Britain had provided for the union of all her North-American possessions in the one great province of the "Dominion of Canada," the American Chamber of Representatives, by an unanimous vote, passed a resolution declaring the uneasiness of the United States at witnessing "such a vast conglomeration of American States established on the Monarchical principle—such a proceeding being in contravention of the traditionary and constantly declared principles of the United States, and endangering their most important interest."

President Polk's announcement in 1848,

and the declaration of the House of Representatives in 1867.

127. The government of the United States viewed with natural jealousy the action taken by certain European powers with regard to Mexico in 1862. England, Spain, and France at first joined in operations to compel the Mexicans to make redress for gross injuries committed towards the subjects of those kingdoms. England and Spain carefully disavowed all intention of interfering with the internal politics of Mexico; but the French Emperor, Napoleon III., determined to attempt the institution of a monarchical form of government in that country. Indeed, a dis-

French Intervention in Mexico in 1862.

tinguished French Senator, M. Chevalier, published an avowal that one purpose of the expedition to Mexico was "to oppose a barrier to the invasion of the whole American Continent by the United States." England and Spain now withdrew from the operations against Mexico; but the French persevered. An imperial form of government was set up over the greater part of the Mexican territories by French auxiliaries for a time, at the head of which was placed Maximilian, a prince of the Austrian royal family. But the resistance of a large part of the Mexican nation, and the avowed and menacing displeasure of the United States at this intervention, induced Napoleon III. after a short period to withdraw his troops; and then the brief empire which they had set up in Mexico came to a disastrous and blood-stained termination. The United States (occupied by their own civil war, which was then raging) did not actually send troops to oppose the French in Mexico; but they steadily refused to recognize Maximilian, or any government, except a republican government in Mexico; and the language of their statesmen exhibited the fullest development of the Monroe doctrine. In a circular addressed by the American Minister, Mr. Seward, to the legations of the United States, he said that, "In the President's judgment, the emancipation of the American Continent from the control of Europe has been the principal feature of the last half-century." In April 1864, the Chamber of Representatives at Washington voted unanimously a declaration that "It is not fitting for the people of the United States

The United States refuse to recognize any but a Republican Government.

Freedom of America from European control.

to recognize a monarchical government erected on the ruins of a republican government in America under the auspices of any European power whatever."

128. While there exist these and many other strong proofs of the prevalence of the Monroe doctrine in the United States*, and of a determination that their great Republic shall assume the Hegemony of the whole of the American Continents, and also of a design that those Continents shall be under republican forms of government and no other, it is right to add that such claims and aspirations have been and are repudiated by some of the most eminent United-States Jurists and politicians. Mr.

More temperate views of some American Statesmen and Jurists.

* The Spanish Jurist, M. Calvo, in his work on Le Droit International, p. 204, ed. 1870, says:—"Il n'est pas un publiciste Américain, qui en traitant des questions de droit international, et en déterminant les liens politiques qui doivent unir l'Amérique et l'Europe, ait émis le moindre doute sur la parfaite légitimité et la haute sagesse des principes proclamés par le Président Monroe, qui, du reste, sont devenus à la fois un bouclier, une arme de combat, et une règle de conduite pour les gouvernements Américains: c'est en leur nom, en effet, que suivant le point de vue adopté, on a affirmé le droit de ces peuples de jouer un rôle dans les grands événements Européens, que l'on a repoussé toute l'intervention étrangère dans les États transatlantiques, que l'on a constitué un grand parti politique, qui donne en quelque sorte l'impulsion aux gouvernements du Nouveau Monde, et que l'on a cherché à propager l'opinion que les États-Unis pouvaient et devaient absorber tous les autres peuples qui habitent les anciennes possessions coloniales de l'Espagne et du Portugal." The instances which will be presently cited in my text and notes show that M. Calvo is not correct in saying that the Publicists of the United States are unanimous in holding these opinions; but it cannot be doubted that such are the opinions of the majority of the better-educated classes, and of almost all members of the less-educated classes of society there.

Calhoun firmly opposed the policy of President Polk as to Yucatan; and one of the ablest late writers in the States on International Law professes the following sound principles on the subject:—"To lay down the principle that the acquisition of territory on this continent by any European power cannot be allowed by the United States would go far beyond any measures dictated by the system of the balance of power; for the rule of self-preservation is not applicable in our case; we fear no neighbours. To lay down the principle that no political systems unlike our own, no change from republican forms to those of monarchy can be endured in the Americas, would be a step in advance of the Congresses at Laybach and Verona; for they apprehended destruction to their political fabrics, and we do not. But to resist attempts of European powers to alter the Constitutions of States on this side of the water is a wise and just opposition to interference. Any thing beyond this justifies the system which absolute governments have initiated for the suppression of revolutions by main force"*.

129. General Halleck, in commenting on the maxim that all States are equal in the eye of Inter-

* Woolsey's 'International Law,' p. 70; and see the remarks at pp. 355 & 356, at the close of the volume, and the final note to the edition of 1874.

The account given in the text of the Monroe doctrine has been taken partly from Woolsey, partly from Calvo, but chiefly from Mr. Lawrence's 'Commentaire sur Wheaton,' vol. ii. pp. 310–339 *et seq.* Mr. Lawrence criticises ably some of the positions that have been assumed by American statesmen.

national Law, says that "a necessary consequence of this equality is the rule that all sovereign princes and States may assume whatever titles of dignity they think fit, and may exact from their own subjects the corresponding marks of honour. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity assumed by Sovereigns"*.

Right of Sovereigns to assume Titles.

130. These things used to be matters of much more importance than they are at present. Even as late as 1788, the Göttingen jurist Martens, in his 'Summary of the Law of Nations' (which was extensively used as a manual on the subject†), says that States are classified into "great" and "little," not according to their dominions or influence, but according to their being entitled or not to *Royal honours*. These "Royal Honours" are carefully explained by Martens. So long as "The Holy Roman Empire" of the Germans continued to exist (that is, until 1806), the Emperor, as the "Kaiser," the "Semper Augustus," as supposed representative of the majesty and preeminence of the real old Roman Emperors, claimed and was allowed a titular superiority over other temporal princes throughout central and western Christendom‡. He especially claimed (though here

Importance formerly assigned to these Titles.

Value of "Royal Honours."

Titular supremacy of the Kaiser of the Holy Roman Empire.

* P. 98.

† See the translation of it by William Cobbett in 1795, dedicated to President Washington.

‡ "For a long time no European sovereign, save the Emperor, used the title of 'Majesty.' The Imperial Chancery conceded it in 1633 to the Kings of England and Sweden, in 1641 to the King of France." —Bryce's *Roman Empire*.

the Pope asserted a counter-claim) the right of bestowing the rank of "King" on potentates who had previously borne an inferior title.

Titles of the Czars and Sultans.

131. In the East of Europe the Grand-Dukes of Muscovy, as soon as they shook off the yoke of the Tartars, styled themselves "Czars"*, a title arrogating supreme authority. Peter and his successors assumed the title of "Emperor of all the Russias;" but it was acknowledged slowly and reluctantly by other powers. The Sovereign of the Ottoman Turks bears among his Oriental subjects, and uses in Diplomacy, the title of "Padischah"†, which is understood to mean "Supreme Sovereign," and to be equivalent to "Emperor." In Martens's time (that is, less than a century ago) the Turkish sovereign claimed a right

* This title is not a corruption of the word "Cæsar," as is often supposed, but an old oriental word meaning sovereign ruler, which the Russians acquired through the Sclavonic translation of the Bible, and which they bestowed at first on the Greek Emperors, and afterwards on the Tartar Khans. See authorities cited in note to p. 341 of vol. i. of my 'History of the Ottoman Turks.'

† "Le titre de *Padicha* (du Persan *Pad, protecteur*, et *chah, roi*), est titre exclusive des souverains ottomans en Orient. François I. fut le premier et longtemps le seul monarque chrétien qui fut qualifié de *padichah* par les Turcs. L'empereur d'Allemagne n'avait à la Porte que le titre de *Nemtché tchaçari* (César d'Allemagne); les Czars de Russie, celui de *Mosgovtchari* et ensuite de *Kouciatchari*. Ce ne fut qu'en 1774, dans le traité de Kaïnardji, qui l'impératrice Cathérine II. obtint l'addition à son titre des mots *vè padichahi*. En Décembre 1805 Napoléon fut reconnu avec la double qualité de *Imperattior vè padichah*. Depuis, le titre de padichah a été étendu à la plupart des souverains de l'Europe, alliés de la Porte."—Ubicini, vol. i. p. 34.

of precedence over the German Emperor, which the German Empire had been compelled to acknowledge by treaties*; "but the other crowned heads do not" (says Martens) "yield the precedence to the Turk as they do to the German Emperor." He adds that "The maxim of civil right, '*Si vinco te vincentem, vinco te,*' however material it may be, is not at all applicable to the matter of precedence" †.

Imperial Title assumed by Napoleon I.

132. Napoleon I. assumed the title of Emperor in 1804. He affected, not without reason, the imperial position which 1000 years before had been held by Charlemagne; and thus there might seem to be some shadowy links between the new French Empire and the Western Empire of old Rome, which Charlemagne was supposed to have revived. But when Francis of Austria, in 1806, declared the dissolution of the Holy Roman Empire of the Germans, and styled himself "Emperor of Austria," the Imperial title was wholly stripped of all associations with old Rome‡. A few years afterwards, when Brazil was

Vagueness of modern title of Emperors.

* Martens, p. 137, Cobbett's translation.

† Ib. p. 138, note.

‡ The Turkish Sultan and the Russian Czar have both claims to the Imperial position once held by the old Roman Emperors of *the East*. The Sultan can claim by right of conquest: he is indeed commonly spoken of by *ultra*-Orientals as "Sultan of *Roum*." The Russian Czar claims by right of marriage. Ivan III. sought out and married Sophia, the last princess of the Greek Imperial family, from which the conquering Ottomans had wrested the Roman empire of the East. From that time forth the two-headed eagle, which had been the imperial cognizance of the Emperors of Constantinople, has been assumed by the Russian sovereigns as their symbol of dominion. Until the marriage of Ivan III. with Sophia the cognizance of the grand princes of

Such communities have consequently been strangers to the numerous bonds of union which existed among Christian States in the middle ages, and at the period (from the last half of the 15th century to the end of the 16th century) when the chief kingdoms and other powers of Europe were assuming their modern developments and forms. In a preceding chapter we have had occasion to ascertain the general applicability of the leading principles of Moral International Law to all nations, whatever be their creeds or their local customs, at least in all cases where there is civilization enough for men* to be organized into Political Communities. Such maxims as "*Suum Cuique*," "*Alterum non lædere*," and "*Keep Faith*," or "*Pacta sunt servanda*," apply to the dealings of a State (which is an assemblage of moral agents, and is itself a moral agent†) with other States in every part of the world. But before a rule of Positive, *i. e.* of Instituted, International Law (not being clearly also a rule of Moral International Law) is enforced on an Asiatic, or African, or American State (not being and never having been a European colony), we ought to have proof, either express or by implication, that the State in question has shown, either expressly or by implication, a recognition of such rule. This may be shown by proof of a general wish manifested by such States to be treated on terms of connected amity, and by proof of mutual observance of respect for rights, and for established international usages. The Ottoman Porte has now long acted, and has long been treated, as bound

Moral International Law almost Universal.

Aliter as to Instituted Law.

Consent how shown.

Cases of Ottoman Porte.

* See *supra*, p. 27. † See *supra*, p. 23.

and as protected by International Law, such as has grown up in European Christendom*. Persia† and Egypt may now be regarded as in the same category; and, to some extent, we may think the same of China‡ and Japan§, by virtue of the treaties that have been recently concluded, and the diplomatic intercourse which has been established with those long "Veiled Powers" of the Far East.

Persia, Egypt.

China, Japan.

137. The Piratical States of the North of Africa, Morocco, Sallee, and the three Barbaresque Regencies (as they were formerly termed) of Algiers, Tripoli, and Tunis (which were nominally subject to the Ottoman Porte, but practically self-ruled), used to furnish text-writers on International Jurisprudence with examples of semicivilized states-which were so far organized and "*mansuefactæ*" that they could not be regarded as

The Barbaresque Powers.

* In the negotiations between the Turks on one side, and the Russian and Austrians on the other side, at the Congress of Nimiroff in 1737, the Ottoman Plenipotentiaries cited Christian writers on the Law of Nations. During the war of the Austrian Succession (1740–1748), Sultan Mahmoud I. offered his mediation to terminate the hostilities that were raging between his Christian neighbours. The Treaties of Sistova 1791, Jassy 1792, and numerous more recent treaties, to which the Sublime Porte was a party, have been concluded according to the usages of International Law; and some of them refer to its principles. See them sketched in Phillimore, vol. i. p. 84. The Porte also is a party to the "Declaration concerning Maritime Law," issued by the principal European powers at the Conference of Paris in 1856.

Mr. Lawrence, in his 'Commentaire sur Wheaton,' vol. i. p. 120, sketches the international relations between the Porte and the chief powers of Christendom.

† Lawrence, 'Commentaire,' vol. i. p. 146.

‡ See Lawrence, 'Commentaire,' vol. i. p. 126.

§ See Lawrence, *ib.* p. 146.

out of the pale of the law of Nations, and yet were so far savage and anarchical that it was not proper to apply to them all the developments of that law. Algiers is now part of the French dominions; Tripoli is effectively under the Sultan's authority; Tunis has relapsed more and more into savagery; yet the decisions and dicta of International Jurists respecting these States as they existed half a century ago, are still practically valuable, as pointing out principles on which questions as to such States (if questions of the kind rise again) should be determined. In 1801, Lord Stowell ruled that the international law of blockade was binding upon the African States*. In part of his judgment he said:—"It has been argued that it would be extremely hard on persons residing in the Kingdom of Morocco if they should be held bound by all the rules of the law of Nations, as it is practised among European States. On many accounts undoubtedly they are not to be strictly considered on the same footing as *European* merchants; they may, on some points of the law of nations, be entitled to a very relaxed application of the principles established, by long usage, between the States of *Europe* holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance. Upon such considerations the Court has, on some occa-

Value of decisions respecting them.

Law of Blockade binding on such States.

* The 'Huztige Hane,' 3 Robinson, 324.

sions, laid it down that the European law of nations is not to be applied in its full rigour to the transactions of persons of the description of the present claimants, and residing in that part of the world. But on a point like this, the *breach of a blockade*, one of the most useful and simple operations of war, in all ages and countries, excepting such as were merely savage, no such indulgence can be shown. It must not be understood by them that, if an European army or fleet is blockading a town or port, they are at liberty to trade with that port. If that could be maintained, it would render the operation of a blockade perfectly nugatory. They, in common with all nations, must be subject to this first and elementary principle of Blockade, that persons are not to carry into the Blockaded port supplies of any kind. It is not a new operation of war, it is almost as old and as general as war itself. The subjects of the Barbary States could not be ignorant of the general rules applying to a blockaded place, so far as concerns the interest and duties of neutrals."

Parts of Law not binding on such States.

138. But (as is pointed out by Dr. Travers Twiss) "in a matter of *form*, which involved only a secondary question of International Right, the same eminent Jurist upheld the transfer of a ship which had been captured by an Algerine cruiser, and subsequently sold *bonâ fide*, although it was not established that the ship had been formally condemned by the sentence of a Prize Tribunal. The Court presumed from the fact that the sale was authorized by the State, and as no remonstrance had been made against it by the

owner of the vessel, that there had been adequate grounds for the confiscation of the vessel"*.

As to uncivilized Tribes.

139. With respect to the application of this branch of Jurisprudence to uncivilized nations, I cannot do better than adopt the words of Polson and Wheaton. "We may conclude [as to such nations] that they are entitled to the protection of international law no further than what an enlightened appreciation of the natural rights of States will obtain for them. To treat these nations with cruelty, to violate their independence, to oppress their citizens, to despoil their dominions,—these are acts so plainly inconsistent with the character of natural justice, that the State which indulged in them would draw down on itself the just indignation of Europe. But, at the same time, these uncivilized States are not entitled to those formal courtesies or privileges which the Comity of civilized nations considers as reciprocally due. They cannot expect to receive advantages which they deny to others; but, on the other hand, in their intercourse with civilized States, they are not oppressed with the necessity of observing the technical solemnities of a jurisprudence, from a full participation in whose benefits they are sequestered by their barbarism"†.

* *The Helene*, 4 Robinson, 3. See same case epitomized in Polson, p. 17.

† Mr. Dudley Field, in his 'International Code,' recommends the following rule:—"Whenever an uncivilized country has an established government, that government is to be respected by civilized governments, so far at least as that, in the first instance, intercourse with its people is to be sought through such government, and redress for injuries from any of them is to be demanded from it" (p. 30). In subsequent parts of this book,

CHAPTER VII.

Further matters to be considered as to the Composition, the Severance, and the Extinction of States.—States under one Chief Ruler. — Personal Union. — England and Hanover. — Real Union.—Incorporate Union.—Federal Compacts.—Federal State-systems, and Supreme States of Federals.—The United States.—Composite States: the British Empire.—How new Sovereign States may be formed.—Voluntary Emancipation by the Imperial Power of part of a Composite State.—Forcible Disruption.—Occupation of New Lands by Bands of Adventurers.—Conquest.—Voluntary joinder with other States.—Diminution of Territory.—Complete Dismemberment.—Liabilities of an Agglomerate State.

Need of considering Composite States.

140. HITHERTO we have been considering a Sovereign State simple, and not supposing it to be (as sometimes is the case) an organized body, made up from the agglomeration of smaller organic bodies, some of which may at one time have had good claims to be regarded as distinct Sovereign States. We must now consider these State-agglomerations. We must also note the fact that a State sometimes throws forth, as offshoots of itself, political communities, which at first are closely connected with the Parent State, and

Offshoot States.

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as to property gained by discovery and occupation of territory, I shall have occasion to discuss further the territorial rights of uncivilized tribes.

thoroughly dependent on it, but which, in the course of time, are apt to acquire various amounts of self-action and self-government. We must consider also, before the close of our task, the effects of voluntary separation upon States, and also the results of disruption by Civil War. We must, moreover, not omit to mention how a State may wholly lose International existence, either by voluntary merger in the dominions of others, or by forcible conquest and annexation.

Effects of separation and disruption of States.

Extinction of States.

141. First, we will consider the union of two or more States under a single Sovereign. It does not always follow that each of these States loses its individual existence as a Sovereign State. Two or more States may be under the same person as their King, or other political chief, and yet each of them may continue to be a distinct Political Society or State. Hanover and the Kingdom of Great Britain were for more than a century in this position. Such a union, so far as it is regarded at all in International Law, is called a *personal* union. It arises solely from the personal position of the individual, or the body, on whom the right to be Chief Executive Officer in each several State has devolved. Neither State recognizes the other as in other respects connected with it by any bonds further than those of close amity. Neither State theoretically regulates or carries on its dealings with a third power, by joint action with the other States. In 1820 the same Prince became King George of England by descent, and King George of Hanover by descent; but he did not reign in

States under Personal Union.

Example of England and Hanover.

Hanover by virtue of his being King of England; nor was his title to the British Crown based on his being the ruler of Hanover. Indeed, as the laws of descent were not the same as to the respective headships of the two countries, the personal union was ended at the death of our King William IV. in 1836, when his niece Victoria became Queen of England, and his brother Ernest became King of Hanover*.

Real Union.

142. "A *real union* of different States, under a common sovereign, is effected when not only the several component parts are united under the same sceptre, but the sovereignty of each is merged in one general sovereignty so far as regards their international relations with other powers, although each may still retain its distinct fundamental laws, and peculiar political institutions. Thus the Austrian Monarchy, prior to 1849, was a *real* union, composed of the Hereditary dominions of the House of Hapsburg, of the Kingdoms of Hungary, of Bohemia, and other States, each of which retained a separate sovereignty with respect to its coordinate States, but which were all component parts of the Austrian Empire with respect to their international relations with foreigners." By the Constitution of 1849, and subsequent organic internal changes, the position of the various parts of this empire relatively to each other have been much varied; and the Hungarian Publicists and Jurists deny that the union between their country and Austria is now

The Austrian Monarchy.

* Wheaton, 'Elem. Int. Law,' vol. i. p. 52; Halleck, 68; Austin, vol. i. p. 62; Bluntschli, pp. 79, 418; Calvo, vol. i. p. 123.

more than Personal; but the union of the rest of the Empire is certainly Real; and Austria is commonly regarded, with respect to both the Cis-Leithan and the Trans-Leithan territories, as forming one Sovereign State in the Commonwealth of nations *.

Incorporate Union.

143. A union such as that which exists between the Britannic Kingdoms is regarded by some Jurists as more than a mere Real union, and is styled an "Incorporate Union"†.

Federal compact.

144. Sovereign States are sometimes effectively held together by a Federal compact without acknowledging any common sovereign. From the extremely complicated nature of many of these leagues, or federal compacts, it is sometimes very difficult to determine how far the sovereignty of each nation is affected or impaired by the conditions or regulations of such union‡. The test seems to be whether each of such Federate States has or not retained the power of judging and determining for itself whether it will be at Peace or War with any external State. If this right of individual free action has been reserved to itself by each State, such States must be considered, so far as foreign powers are concerned, as individually responsible for "their conduct, and as separate independent States." States thus circumstanced constitute what the Germans term a "*Staatenbund*;" they make up a system

Frequent complication of the characteristics of such State Associations.

Systems of Federate States, and Supreme Government of Federates.

* Halleck, 69; Wheaton, 'Elements,' vol. i. p. 53. See especially as the present condition of Hungary, Lawrence, 'Commentaire,' vol. i. 283, and Calvo, vol. i. p. 123, and note.

† Wheaton, 'Elem.,' vol. i. p. 53; Lawrence, 'Commentaire,' vol. i. p. 285; Calvo, i. 124.

‡ Halleck, 70.

of Confederated States only for purposes of domestic and internal policy. The Germans give the name of *Bundesstaat* to a Supreme Government embracing several States*.

* See Wheaton, 'Elem.' vol. i. p. 55, and note; and see Calvo, vol. i. p. 127. There may be a union of States, in which each State has the bare power of refusing its consent to the measures voted by the general governing body, and thereby paralyzing its action; but if this is all that the individual State can do, if it can originate nothing for itself, the United body will take rank among civilized States as a compound Sovereign power. Such was the position of the Seven United Provinces (which we commonly speak of as "The Dutch") for some centuries. Indeed, a single municipality had practically a power of veto. Readers of Macaulay will remember his vivid description of the difficulties which this condition of things placed in the way of William's great enterprise in 1688 (Macaulay, vol. ii. p. 414).

The varying phases of the confederation of the Swiss Cantons have made it very difficult to define, from time to time, the *status* of each Canton as to Sovereignty. See as to the Swiss Confederation, Lawrence, 'Commentaire sur Wheaton,' t. 2, p. 174; and Martin's 'Statesman's Handbook' for 1874.

It would lead us too far away from our immediate practical subject if we were here to investigate the very complex nature of the mediæval and modern German Empire, called, more correctly, the Holy Roman Empire of the Germanic nation, which was founded by Charlemagne, and which endured until 1806, when it was dissolved in consequence of the reverses sustained by Austria (then, and long before then, the chief power of the Empire) in her warfare with the First Napoleon. It is true that the student of the history of International Law will find that the history of the German Empire forms an important part of his subject. The Empire was, to a great extent, the cause of the growth and long stability of the European political States-system, in which numerous small but independent States were coexistent with powerful kingdoms. The traditions and maxims of the theory of the Imperial supreme rule taught emphatically the sacredness of recognized lawful

Holy Roman Empire of the Germans.

Supreme Federal Government.

145. A Federal Government (called sometimes a Supreme Federal Goverment) is created when two or more Free States (usually but not necessarily Republics), without giving up each its own individuality and local self-rule, bind themselves together for common defence against internal and external violence, and organize a central Government (which may be simple or very complex), to which central Government are appropriated the powers of declaring peace or war, of forming treaties, and of levying a national army and navy for the protection and service of the entire union. This organization for general self-defence is usually (but not necessarily) accompanied by constitutional provisions for joint legislation and joint administration of justice as to specified matters of common concernment and primary importance.

Sir Robert Phillimore rightly says* :—

The United States of North America.

146. "The United States of North America fur-

possession; and in this and many other respects the great Jurists of the Continent, century after century, prepared the materials and advanced the construction of Modern International Law out of the laws of old Rome. But the Holy Roman Empire of the Germanic nations is now as completely a thing of the past as is the Roman Empire of the Antonines or that of the Constantines. The consideration of things present is more than enough for the scope of this book. I pass over, as equally things of the past, the Confederation of the Rhine, which under French auspices partially succeeded to the German Empire from 1806 to the time of the fall of Napoleon I., and the subsequent Germanic Confederation, which existed from 1815 (except the revolutionary period of 1848) to the times of the recent overthrow of Austria by Prussia, and of the installation of the latter kingdom as the paramount power of Germany.

* Vol. i. p. 138.

nish the greatest example which the world has yet seen of a Federal Government."

When they first established their independence of Great Britain (which had previously been their Imperial State), they connected themselves together by a compact of confederation, which gave to a Congress "the chief right of political supremacy (the '*jura summi Imperii*'*), including the exclusive cognizance of foreign relations, the rights of war and peace, and the right to make unlimited requisitions of men and money." This made the United States one Sovereign State for the purposes of International Law; but many difficulties as to enforcing general laws and regulating foreign affairs were left unprovided for by the Federation of 1778; and in 1787 a far more complete constitutional union was effected.

Their original Federation.

Their Constitution of 1787.

The attempts made by the Southern States to secede from the Northern led to the terrible civil war of 1861–1865. By the complete abolition of slavery throughout the States, which was a result of the success of the Northern States, the solidity of the Union has been greatly augmented†.

147. Supreme Federal Governments of this kind are sometimes termed "Composite States;" but the term "Composite State" seems to be not quite applicable to an assemblage of originally Free and

Composite States.

* Kent, 'Commentaries,' vol. i. pp. 220, 222.

† For a succinct but clear account of the numerous interesting questions in Constitutional Law, which have arisen in America during and since the civil war, see Lawrence, 'Commentaire sur Wheaton,' vol. ii. pp. 142–161.

Equal States. The term "Composite State" is better (and is usually) applied to a State consisting of a dominant State and of a system of Colonies, or other outlying dependencies, towards which it stands in the relation of "Imperial State." It is their Imperial State, so long as it does not allow them to determine with what foreigners they shall have peace or war, but reserves this prerogative for itself exclusively. It may have granted them very large powers of self-government, such, for instance, as the Dominion of Canada, and the chief Australian Colonies now enjoy. But if these colonies and other outlying provinces cannot make peace and war of their own authority, they are still mere members of the Empire over which the Imperial State is paramount; and the whole Empire forms, for purposes of International Law, one Political Society, one Sovereign State. This is the case with the vast assemblage of nations and territories in every part of the world which make up the British Empire, over which the Imperial Parliament of Great Britain and Ireland, consisting of Queen, Lords, and Commons, is the Paramount power—Her Majesty our Queen being the visible Representative of the whole Empire towards all foreign bodies*.

How new Sovereign States may be formed.

148. We have seen one mode by which a new Sovereign State may come into existence—namely, when two or more Independent States coalesce or become confederate, and form a new incorporate State. United

* See Austin, vol. i. p. 264; Macaulay's 'History of England,' vol. v. p. 56; and 'Imperial and Colonial Constitutions of the British Empire,' p. 56.

States may voluntarily dissolve their Union, and each resume its old separate condition of existence. A large State may by the general consent of its members divide itself into two or more independent Sovereign States. In a Composite State the Imperial Government may voluntarily abdicate its supremacy over part of its dependencies; and the part so released may become an independent, self-governing community. Such was the case in 1863 when Her Majesty the Queen of the United Kingdom of Great Britain and Ireland declared and proclaimed the abandonment and renunciation of her dominion and sovereignty over the Orange-River Territory in South Africa and the inhabitants thereof*. This territory (which had previously been annexed to the Cape Colony) has since the British renunciation become an independent Republic.

Abandonment of Dominant Power of Imperial Supremacy over part of a Composite State.

Case of the Orange-River Territory.

149. But the creation of new States out of the members of Confederate State-systems, or out of the dependencies in Composite States, is far more frequently the result of forcible secession or Revolt and of civil war, in which the Seceders or Insurgents are successful. The question of when the Belligerent *Status* of such seceders and revolters ought to be recognized by foreign States is a difficult question; and the question of when the complete independence of such seceders and insurgents ought to be recognized is more difficult still. Both will be dealt with in a subsequent part of this treatise, where we shall have

The forcible distruption of Confederate or Composite States a more frequent cause of origination of new States.

* See 'Imperial and Colonial Constitutions,' p. 343.

to consider what International Rights and duties arise out of a condition of Warfare.

Formation of new States by a band of Adventurers.

150. There cannot now often occur instances of the seemingly most natural mode, by which in former periods of the world's history the foundation of New States was often effected—namely, by a band of adventurers taking possession of previously unoccupied countries, and organizing political communities therein. If the whole or the great majority of such a band of settlers were subjects of the British Crown, their settlement (if valuable and worth claiming) would be considered to have been made for the benefit of the British Crown; and the territory would be regarded as part of the British dominions*. The other great Powers of the present civilized world would, it is apprehended, deal in a similar manner with any territories that might be occupied by settlers consisting mainly of *their* subjects. It is, of course, possible to suppose that the old mother-country of the settlers might disclaim the new province, and might waive her right to the allegiance of those who took up their abode there. But such contingencies are improbable.

Conquest.

Voluntary Merger.

151. A State may lose its existence by being conquered by a foreign Power, and by being forcibly fused into the dominions of its conquerors†. Or it may lose its sovereign independency by voluntary

* See Forsyth's 'Constitutional Cases,' p. 20.

† We shall have to consider in another part of this treatise how far it is necessary that conquest shall be followed by (*a*) treaty of cession, or (*b*) by the long acquiescence, voluntary or involuntary, of the conquered population.

merger in a system under a Supreme Federal Government, or by voluntarily becoming part of a Composite State.

Diminution of territory.

152. The mere weakening or diminution of a State by its losing portions of its territories and population does not affect its personal identity, or abolish its rights and duties relatively to other Powers. And where a State is entirely dismembered either by war or by voluntary separation into several distinct integral States, its rights and obligations as to foreign States do not become nullities, but, unless they have been made the subject of a special agreement, they devolve rateably upon the several parts*. Mr. Justice Story, in a judgment of the Supreme Court of the United States, says of this, "It has been asserted as a principle of Common Law that the division of an Empire creates no forfeiture of previously vested rights of property; and this principle is equally consonant with the common sense of mankind, and with the maxims of external justice"†.

Complete dismemberment.

This works no extinction of foreign rights.

Liabilities to foreigners of Agglomerated States.

153. With regard to the liability of an agglomerated State for the antecedent obligations of the States, that unite in a federate system with it, or that blend in it, the converse of the rule, which has been just stated, is generally true. Halleck sums up the matter thus:— "Where several separate States are incorporated into a new Sovereignty, the rights and obligations which had

* Kent, vol. i. p. 28; Phillimore, vol. i. p. 157; Halleck, p. 78.

† Terret *v.* Taylor, 9 Cranch Rep. 50, cited by Phillimore, vol. i. p. 158, n., and Halleck, p. 78.

accrued to each one separately, before the incorporation, belong to, and are binding upon, the new State which is created by such incorporation. But the rule must be varied or modified to suit the nature of the union formed, and the character of the act itself of incorporation in each particular case. Thus a distinction must be made between the mere union or confederation of States, and the creation of a new Sovereignty or Composite State. In the one case, the obligations would remain with the States originally separate; while in the other case they would, as a general rule, be transferred from the constituent parts to the new body political. But if by the act of incorporation and by the constitution of the Composite State, the rights and obligations of the component parts were to remain with the States originally separate, it would hardly be contended that the new Sovereignty had either acquired the one or incurred the other. What might be claimed or incurred, under a general rule of presumptive law, could hardly be enforced against written instruments which provide especially against such claims or obligations. Nevertheless, if one of these constituent parts, originally a separate State, should by the act of incorporation vest in the new Sovereignty all its means of satisfying its debts and obligations, the new State would, even in the case of a mere federal union, be bound to assume such debts and obligations to the extent of the means so transferred"*.

* Halleck, p. 79.

CHAPTER VIII.

Of Perfect Rights of States.

Definition of "Perfect Right" repeated.—Classification of "Rights."—Main Right the Right of Self-preservation.—Right to Security.—Right to anticipate attack.—Right to Indemnity.—Balance of Power.—Rights to Self-improvement; to protect Honour.—The National Flag.—Rights of component Parts of State.—Duty of State to protect its Citizens.—States' Responsibility for their Acts.—Right to Independence.—To exclusive Territorial Jurisdiction: Exceptions, Foreign Sovereign, Ambassadors.—Rights as to Foreign Ships in Territorial Waters, Distinctions as to Private Vessels and Men-of-War.—Peculiar Doctrines of French Courts as to Private Ships.—Nature and Origin of War Ship's rights as to Exterritoriality.—Discussions at the Geneva Arbitration.—Privilege does not extend to Crews on Shore.—Perfect Right of a State, though it may be against Comity, to exclude Foreigners and to control Commerce.—Rights of Property.—Rights as to Rivers, as to Enclosed Seas and Open Seas.—Modes of Acquisition, Alienation, and Loss.—Domain.—Dominium Eminens.—Rights by Discovery.

Definition of "Perfect Right."

154. It has been explained already* that in International Law the term "Perfect Right" means a

* See pp. 65, 15, *supra*; and observe also the following extract from Vattel (Préliminaires, sect. 17):—"Le *Droit parfait* est celui auquel se trouve joint le droit de contraindre ceux qui ne veulent pas satisfaire à l'obligation qui y répond; et le *droit imparfait* est celui qui n'est pas accompagné de ce

right which is sanctioned by Positive Law, and the breach of which is considered to constitute a "Casus Belli."

155. Without reiteration of the epithet "Perfect," it will be understood that in this and the subsequent chapters of this book, a "Perfect Right" is meant whenever a Right of a State is mentioned.

Classification of Rights of States.

156. It is convenient to classify the Rights of States into :—

Pacific Rights.

1st. Those General Rights which do not arise out of a condition of Warfare. These are sometimes called "The Pacific Rights" of States;

Rights arising out of State of Warfare.

2nd. Those Rights which arise out of a condition of actual warfare.

Primary Rights.

157. The most important and general pacific Rights are also termed "Primary Rights." The Primary Rights of States are often stated to be—

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droit de contraint. L'obligation parfaite est celle qui produit le droit de contrainte; *l'imparfaite* ne donne à autrui que le droit de demander.

"On comprendra maintenant sans difficulté, pourquoi le droit est toujours imparfait quand l'obligation qui y répond dépend du jugement de celui en qui elle se trouve. Car si dans ce cas-là, on avait droit de le contraindre, il ne dépendrait plus de lui de résoudre ce qu'il a à faire pour obéir aux lois de sa conscience. Notre obligation est toujours imparfaite par rapport à autrui, quand le jugement de ce que nous avons à faire nous est réservé; et ce jugement nous est réservé dans toutes les occasions où nous devons être libres." Dr. Travers Twiss, who translates this passage in the 12th page of his first volume, adds the observation, "A Perfect Right alone would thus seem to be the subject of Law [*i. e.* of Positive Law]; an imperfect Right is a subject of Comity."

The Right to Security,
The Right to Independence,
The Right of Equality,
The Right of Ownership,
And Empire.

These (and other ramifications of rights which are added by some writers) are in truth all mere branches and developments of the one Great Right of Self-preservation. Instinct prompts every animal to exercise this right:—Reason and Justice teach every man to claim it for himself, and to respect it in others*. The same is the case with regard to every assemblage of human beings, which, under the conditions described in a previous chapter, constitute a Sovereign State.

All Branches of Right of Self-preservation.

158. With regard to the subdivisions of this great Right, which have just been mentioned, the Right of all States, small or great, to be treated as equal in the eye of International Law, has been already considered†. Rights of Ownership and Empire will be discussed presently. The important branches of Right, which are first to be dealt with, are the Right to Security and the Right to Independence.

Right to Security.
Right to Independence.

159. These two Rights commingle and become almost identical for many purposes; but such is not the case for all purposes; and on some points they come into collision, or at least into apparent collision, with one another‡. It is best, therefore,

* "Quod quisque propter defensionem sui fecerit jure fecisse videatur."—Digest. De Just. et Jure.

† See p. 114, *suprà*.

‡ The collision of Rights will be the subject of a distinct chapter.

to follow the usual course, and to discuss them separately.

Right of Self-defence involves Right to anticipate attack.

160. A State's Right to Security means not only the Right to defend itself against actual direct attack, but the Right to preserve itself from injury by anticipating attack, in cases where it is manifest that attack is intended, and that such attack cannot be prevented by any pacific measures, which do not involve undue self-abasement and loss of real national dignity*. In such cases (as in those of quarrels between individuals) the real aggressor is not he who first employs force, but he who renders the employment of force necessary.

Right to exact reparation.

161. A State may do more for its Security than simply prevent or repel attack. There is a Right springing from the same great Primary principle of Self-preservation, which, when an injury has been inflicted, authorizes the injured Nation to obtain complete reparation, and to employ force for that purpose. This may be termed *the right of indemnity*. The right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end. Thus a Nation, after it has been attacked and has worsted its enemy, will be

Right of Indemnity.

* "The Right of a Nation to preserve itself from injury is a *Perfect* Right." — Travers Twiss, vol. i. p. 12. "Dès que le danger existe, la nation menacée a le droit d'opposer la force, et même d'aller au devant de l'attaque qui la menace, en attaquant *elle*-même. C'est ce que conseillaient déjà les lois Romaines '*Melius est occurrere in tempore quam post exitum vindicare.*' (Code, '*Quando liceat unicuique*')". — Heffter, *Droit International*, p. 59.

justified in taking precautions against a second attack, by depriving its enemy of the means of renewing his aggression. The justice of all War depends upon the principles involved in the right of security and the right of indemnity. "Whatever strikes at those rights strikes at the Perfect Rights of a Nation, and gives a just cause of war. Every right, which a Nation possesses under the Common Law, has its corresponding obligation. The right of security accordingly involves the obligation of Self-restraint, so as to avoid encroaching on the independence of other States; and the right of indemnity involves the obligation of granting redress. A nation is [legally] mistress of her own actions, as long as they do not affect the *perfect* rights of other Nations" *.

The Balance of Power.

162. A Nation is also entitled to provide for her own future and permanent Security by taking measures, either singly or in concert with other nations, to prevent any one nation from acquiring a preponderance of power, perilous and menacing to the security of its neighbour. This is called the doctrine of the Balance of Power. It involves many difficult questions. We see plainly that when the Security of one State is protected in this manner, the Security and the Independence of another State may be impaired. I will reserve for a separate chapter, on

* Travers Twiss, vol. i. p. 13. A reference to the context will show that this learned jurist, in speaking of a nation being mistress of her own acts, *so long as she does not infringe the perfect rights of other nations*, is speaking of her freedom so far as regards the restraints of Positive Law only. He points out very forcibly her ampler obligations under Moral Law.

"The Conflict of International Rights," our consideration of this topic, and of certain other topics of a similar character. Such are the Right (real or supposed) of a State to protect its own Security by checking the contagious spread of anarchical and pernicious doctrines and practices in a neighbouring State; and the right of a State, when in extreme peril, to seize the territory, or forts, or fleets of an unoffending neighbour, lest they should be seized and employed against it by a hostile State.

Right to Preserve implies Right to improve.

163. Subject to the question, which will be discussed hereafter, of how far the principle of the Balance of Power may justify extraneous checks on a State's self-aggrandizement, we may unhesitatingly assert, that a State's right to Security does more than justify it in seeking to preserve its territories, its property, its population, its military and naval resources, its means for developing human happiness, physical, intellectual, and moral. The right to Security authorizes and requires a State to seek not merely to preserve all these things, but to increase and to improve them. Vattel says truly of a State's duties towards itself, that "*Se conserver et se perfectionner*, c'est la somme de tous devoirs envers soi-même." In truth, the two duties coincide.

It is only by incessant efforts at amelioration that the silent, secret, ceaseless processes of deterioration, worked by "the great innovator Time," can be counteracted. "A State," writes Vattel, "that increases her power by all the acts of good government, does no more than what is commendable; she

fulfils her *duty towards herself* without violating those duties which she owes to other Nations." The right of every "Independent State," says Wheaton, "to increase its national dominions, wealth, population, and power by all innocent and lawful means—such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force—is an incontrovertible right of Sovereignty, recognized by the general usage and opinion of Nations"*.

Right of State to protect its Honour.

164. A State has the right to repel and to exact redress for injuries to its honour. This also is a right of Self-preservation. For, among Nations, as among Individuals, those, who tamely submit to insult, will be sure to have insults and outrages heaped upon them, until the sense of intolerable wrong drives them into physical contest under probably disadvantageous circumstances, and after they have deprived themselves of that general sympathy which manly and consistent conduct will always obtain for even the unsuccessful brave. Without doubt vain-glory and bluster are as detestable in a nation as in a private person. True Honour consists in combining self-respect with respect for the feelings and rights of others†. When "Glory" is thus understood, Vattel's

* Vattel, liv. 3, c. iii. sec. 42. Wheaton's 'Elements,' part ii. c. i. sect. 3. These two passages are quoted by Dr. Travers Twiss, vol. i. p. 147.

† The single Greek word Αἰδὼς simply and eloquently expresses all this, and much more.

In making serious contumely

maxim is perfectly true, that "Puisque la gloire d'une Nation est un bien très-réel, elle est en droit de la défendre, tout comme les autres avantages. Celui qui attaque sa gloire, lui fait injure. Elle est fondée à exiger de lui-même par la force des armes, une juste réparation" *.

The National Flag.

165. The special symbol of a State's honour, power, and glory is its national flag. For any insult offered to the National Flag the most prompt and full apology and reparation should be required. Sir James Mackintosh has well said that "an insult offered to the British flag flying on the slightest skiff, is, if unrepaired, a dishonour to the British nation" †. And we must remember that other States are in this respect as justly sensitive as we ourselves can be.

A State's Rights and duties as to its component members.

166. A State's rights and duties as to self-preservation extend not only to what we may call the *corpus*, the main entity of the State, but to all its members, whether we consider it territorially, or with reference to the human beings who are members of the State, wherever they may be resident. The bulk of a State has no moral right to abandon a province

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to honour a cause for hostile proceedings, International Law follows the Roman Civil Law, according to which "Dignitas quoque hominis in jure consideratur;" and "Injuria" in the form of contumely is described as "Injuria non bonis damnum factum intelligitur, sed contra personæ dignitatem."—See Warnkoenig, 'Institutiones Juris Romani Privati,' sects. 126 and 986.

* Livre 1. c. xv. sect. 191.

† Mackintosh, p. 763, one-vol. edition. The passage is cited by Dr. Phillimore, vol. ii. p. 34.

or a town against its will, or even to cast off a reluctant individual citizen, unless under the constraint of imperious necessity, and in cases where very strong reasons, based upon the public safety, make a special law of action requisite for the occasion*.

* Vattel, livre 1. ch. ii. § 17. The writings of some recent Publicists contain expressions which, if taken literally and without reference to the context, might seem to imply the dangerous doctrine that a State's cession of a part of its territory must be always both morally wrong and legally invalid, unless the inhabitants of the ceded portion consent to the transfer of their nationality. Thus, in Bluntschli (Droit International, sect. 286, p. 174), we read that, "Pour qu'une cession de territoire soit valable, il faut: [*inter alia*] comme minimum, la reconnoissance de la cession par les personnes qui, habitant le territoire cédé et y jouissant de leurs droits politiques, passent au nouvel état." But Bluntschli, after proceeding to discuss the manner in which the will of the transferred population should be expressed, adds these words:—"Quelle que soit la forme choisie, la décision principale ne peut cependant dépendre du bon plaisir de la partie de la population qui doit changer de nationalité; cette population n'est que la partie et non le tout. La décision principale dépend des *états* ou des *peuples*, qui, disposent des parties de l'état ou du peuple." This overrules the first-cited dictum, and must be taken to express M. Bluntschli's opinion on the subject, and the true opinion also.

At p. 302, vol. i. of M. Calvo's work we read:—"Désormais, pour rendre définitifs et valides la cession le transfert ou la vente d'un territoire, il faut que les habitants même du pays appelé à changer de nationalité y donnent leur consentement exprès ou tacite." M. Calvo calls this a "nouvelle règle internationale;" but the only authorities which he gives for its establishment are references to the course taken in 1860, when Savoy was transferred to France, in 1863 when the Ionian Isles were transferred to Greece, and in 1866 respecting the cession to Prussia of the northern districts of Schleswig, and the cession of the Venetian territory by France to Italy.

It is of course very desirable that the consent of the in-

Duty of State to protect its citizens wherever resident.

167. A State has the right, and it is the duty of a State, to ensure security for the persons and property of her subjects, wherever they may be resident. If an injury be done by foreigners to a man who is in his own country, there is at once a commission of direct injury to the territorial security and independence of the country, the soil of which is thus outraged, and the right of the injured State to exact redress is self-apparent. If the injured citizen be resident in a foreign country, the international wrong is less obvious, but not less real. Vattel says *:—"Whoever illtreats the citizen of a State commits an indirect offence against the State, which is bound to protect its citizens. The supreme power of that State ought to exact redress for such injury, and to oblige, if it has the power, the assailant to make complete reparation for the wrong, inasmuch as otherwise the citizen could not obtain the primary object of civil association, which is Security" †.

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habitants of any part of a State's territory should be obtained when it is proposed to alienate such portion. But it is a widely different matter to make such a consent an indispensable *sine quâ non* condition. Such a principle would make it impossible to save the whole of a defeated State from utter ruin and conquest by the sacrifice of a portion.

The topics of how the laws of a territory are affected by hostile occupation of a territory, of how far the actual taking possession of ceded territory is necessary to complete a title by cession, and of the condition of the ceded and occupied territory's institutions, will be discussed in other parts of this volume.

* Liv. 2. vi. sec. 71.

† See as to this subject Phillimore, vol. ii. p. 3 *et seq.* Bluntschli has pointed out that a wrong of this kind may be

168. But while a State has thus the right to protect its individual citizens, it is under a correlative

Correlative responsibility of State for acts of its citizens.

committed:—1st, directly, by a proceeding in violation of International Law taken by the offending State itself against the citizen of another State; or, 2, indirectly, by the State neglecting to give the foreigner, whom individuals within its jurisdiction have injured, proper protection or redress. The whole passage in Bluntschli is important; and I quote it here, though I shall have occasion to revert to the subject in the chapter on the Conflict of Rights. "L'État a le droit et le devoir de protéger ses ressortissants à l'étranger par tous les moyens autorisés par le droit international: (a) Lorsque l'état étranger a procédé contre eux en violant les principes de ce droit. (b) Lorsque les mauvais traitements ou dommages subis par un de ses ressortissants ne sont pas directement le fait de l'état étranger, mais que celui-ci n'a rien fait pour s'y opposer.

"Chaque état a le droit de demander en pareil cas la réparation de l'injustice, le remboursement du dommage causé, et d'exiger, suivant les circonstances, des garanties contre le renouvellement de pareils actes.

"1. *Examples.*—L'état étranger arrête sans motif des voyageurs, les réduit en esclavage, les force à abjurer leur religion, les dépouille de leur biens, les traite avec cruauté, viole en leur personne les traités de commerce ou de libre échange entre elles. Les états sont, il est vrai, les seules personnes du droit international, mais les citoyens aussi sont, par l'intermédiaire des états, placés sous la protection de ce droit. En 1867, la Grande-Bretagne a déclaré la guerre au roi d'Abyssinie, parce qu'il retenait illégalement des Anglais prisonniers.

"2. Lorsque ce n'est pas directement le gouvernement étranger, les employés de cet état, ou les habitants appuyés par leur gouvernement, qui attentent à la personne ou aux biens du ressortissant d'un état étranger, mais qu'au contraire le dommage provient de personnes ayant un caractère privé (brigands, voleurs, rôdeurs, etc.), c'est à l'état dans lequel le délit a été commis qu'incombe en première ligne l'obligation de réparer l'injustice et de punir les coupables. Cet état aurait pleinement raison de ne pas tolérer l'immixtion des autorités étrangères dans l'administra-

duty to prevent its citizens from injuring other States; and if a State fail to do this, it is bound in general to make reparation for such injuries.

169. Sir Alexander Cockburn has explained this forcibly and fully in his recent judgment in the Geneva Arbitration. The words of the Lord Chief Justice of England are as follows:—

Chief Justice Cockburn's exposition of this.

"Whatever obligations attach by the general prin-

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tion de la justice. Le citoyen lésé ou offensé doit donc, même s'il appartient à une autre nationalité, s'adresser d'abord aux autorités de l'état où il habite. Mais si on refuse de lui rendre justice, alors l'état dont la partie lésée est originaire pourra intervenir. Il faut ici éviter deux extrêmes, l'un consistant à laisser ses ressortissants sans protection contres les injures qui peuvent leur être faites à l'étranger (c'etait jusqu'à ces derniers temps le cas des citoyens des petits états Allemands), l'autre consistant à s'immiscer dans l'administration et la justice des pays étrangers, et à agir immédiatement par la voie diplomatique en faveur de ses ressortissants avant d'avoir cherché à leur faire rendre justice par les moyens ordinaires (on a souvent reproché cette tendance à l'Angleterre). Dans le premier cas, on compromet la sûreté de ces ressortissants à l'étranger; dans le second, on porte atteinte à l'égalité des états et a l'indépendance des tribunaux. Il faut du reste supposer dans tous ces cas la *bona fides* des parties. Lorsque les tribunaux d'un état, tout en respectant les formes se rendent évidemment coupables de déni de justice, et rejettent la demande d'un étranger à cause de sa nationalité, ou bien, ne lui faisant droit qu'en apparence, le laissent en réalité sans protection contre ses persécuteurs, dans tous ces cas, on pourra intervenir diplomatiquement en faveur de la partie lésée. Celle-ci n'a droit à la protection de ce gouvernement que si le droit international a été foulé aux pieds en sa personne, mais non lorsqu'elle a perdu un procès qu'elle devait gagner dans son opinion, ou lorsque le jugement qui l'a condamné est déclaré injuste par les jurisconsultes de son pays."—Page 223.

ciples of the law of Nations to the State or Community as a whole, are equally binding on its subjects or citizens; for the State or Community is but the aggregate of its individual members, and whatever is forbidden to the entire body by that law is equally forbidden to its component parts. In this sense, and in this sense only, can it be said that International Law—in other words, the common law of nations—forms part of the common law of England; for the greater part of the rules of International Law, by which nations now consent to be bound, are posterior in date by many centuries to the formation of the common law of England. Nevertheless, as Great Britain forms part of the great fraternity of nations, the English common law adopts the fundamental principles of International Law, and the obligations and duties they impose; so that it becomes, by force of the municipal law, the duty of every man, so far as in him lies, to observe them, by reason of which any act done in contravention of such obligations becomes an offence against the law of his own country.

How an offence against International Law becomes an offence also against the municipal Law of the offender's State.

"But the subject who infringes the law of his own country by violating the neutrality which the law enjoins him to maintain is amenable for his offence to the law of his own country alone, except when actually taking part in the war as a combatant, when of course he is liable to be dealt with according to the laws of war. The offended belligerent has otherwise no hold on him. International Law knows of no relations between a State and the subjects of another State, but only of those which exist between State

Extent of his liability individually.

and State. But this being so, the belligerent against whom a breach of neutrality has been committed by the subject of a neutral State, as distinguished from the State itself, may have a right to hold the State responsible, and to look to it for redress. For the State (that is, the Community as a whole) is bound to restrain its individual members from violating obligations which, as a whole, it is bound to fulfil. Not, however, that the responsibility of the State for the acts of its subjects is absolute and unlimited. Reason has set bounds to a responsibility which would otherwise be intolerable. For it must be remembered that the consequence of a violation of neutrality is the right of the offended belligerent [*i.e.* the foreign State] to treat the offending neutral as an enemy, and declare war against him. He [the foreign Sovereign] is not bound to accept pecuniary amends as an alternative. Now reason points out that the government of a country can only be held responsible for breaches of neutrality committed by its subjects when it can reasonably be expected to prevent them. There are things which a government *can* prevent, and others which it cannot. It can prevent things that are done openly, and in defiance of the law. The open buying of men, and expeditions departing from its territory by land or water, are things which a Government would properly be expected to prevent, and for which, if not prevented, it would be answerable. But a Government could not be so held in respect of things it cannot prevent, such as the conduct of individual subjects in enlisting or serving in the land or sea

Extent of State's Responsibility.

force of a belligerent—or things done clandestinely or surreptitiously, so as to elude observation or detection, notwithstanding the exercise of proper diligence to prevent the law from being broken. But then the exercise of such diligence is part of the duty of a Government, and the condition of its immunity. If this diligence has been wanting, a belligerent [*i.e.* a foreign State] has just cause to hold the neutral State responsible for wrongful acts done by its subjects in violation of neutrality, and from which it, the belligerent [*i.e.* the foreign State], has suffered"*.

Opinions of Vattel and Halleck.

170. The observations of Vattel on this subject are cited by General Halleck, with the addition of comments of his own, in a very valuable passage which I will transcribe†. "The nation ought not to suffer its citizens to do an injury to the subjects of another State, much less to offend the State itself. And that, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of Nature, but also because nations ought mutually to respect each other, to abstain from all offence, from all injury, and, in a word, from every thing that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he

* The word "Belligerent" is frequently used in this Judgment, as the Chief Justice was then speaking with special reference to events that had occurred during the Civil War in America. But the principles laid down are generally applicable to the relations of States towards each other.

† Halleck, p. 274.

does no less injury to that nation than if he injured them himself. In short, the safety of the State, and that of human society requires this attention from every sovereign." Again, "As it is impossible for the best regulated State, or for the most vigilant and absolute sovereign to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say in general that we have received an injury from a nation, because we have received it from one of its members." The act of the individual is not necessarily and of consequence the act of the State; nor would it be just in all cases to hold a State responsible for the act of each individual member of which it is composed. The responsibility of the State results from its neglect or culpable inability to control the conduct of its subjects, or from its neglect or culpable inability to punish the offences and crimes which they commit. "But," says the same author, "if a nation, or its ruler, approves and ratifies the act committed by a citizen, it makes that act its own; the offence must then be attributed to the nation as the true author of the injury, of which the citizen is perhaps only the instrument. So, also, the sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, renders himself in some measure an accomplice in the injury, and becomes responsible for it. If a nation should refuse or fail to pass the laws necessary to

restrain its citizens from aggressions upon other States, or upon their citizens, or if, such laws being enacted, the officers of the State neglect to enforce them, and such aggression by individuals result therefrom, the State is unquestionably responsible for the injury"*.

State's Right to Independence.

171. The discussion of a State's Right to Independence comes next in order. Much, however, of this subject has already been unavoidably anticipated. We have seen that for a State to have existence in the eye of International Law it must be a State with Independent powers of making peace or War, and of forming alliances according to its own discretion†. We have also seen that every State must have the right to establish, alter, or abolish its own internal form of Government, and to choose its own rulers at its own free will—and that any changes which it may make in this respect do not affect its claims upon other States, or the liabilities which it may have contracted towards them‡.

This is implied in its entity as a State.

Freedom from administrative control *ab extra*.

172. A State has a right to independence from all foreign control in the administration as well as in the framing of its laws. How this right may conflict with the right, already adverted to, of each State to protect its subjects, though commorant in a foreign country, from injury, will be discussed hereafter. The frequent recognition by one State of the laws of

* The character and the amount of negligence which makes a State liable for the acts of its individual members will be further discussed in the ensuing chapter "On the Conflict of Rights."

† See p. 93, *suprà*.

‡ See p. 102, *suprà*.

Recognition *ex comitate* only of foreign laws.

another State as to contracts made abroad, as to matters of domicile, and other similar things, is a topic coming under that division of International Law which treats of the Comity of Nations, a division which is reserved for notice presently. Suffice it to say here, in the words of a judgment of one of our English Courts*, that "when the tribunals of a State determine the rights of foreigners in accordance with the laws of the countries of those foreigners, the State, in which litigation takes place, does so, not on account of any force which foreign laws have over it, but because it courteously adopts those laws as part of its own law for the purpose of regulating those rights." Although this is a subject more properly belonging to a discussion on the Comity of Nations than to one on a State's perfect rights, I may here usefully quote the principal rules on the subject as they are laid down by the Dutch jurist Huber, and adopted by Story and by Bowyer. The original Latin text may be seen in the note to p. 162 of Sir George Bowyer's work on Public Law†.

Huber's General Rules.

The rules are three in number:—

"1. The Laws of every State have force everywhere within the boundaries of the said State, and bind all who are subject to the Government of the said State; but they have force no further‡.

* Caldwell *v.* Valdesslingen, 8 Hare, 426.

† And in Lawrence, 'Commentaire,' vol. iii. p. 52.

‡ Except over the State's own subjects to this extent, that such subjects, on coming within the territorial jurisdiction of their own country's tribunals, are punishable for

"2. All persons who are found within the boundaries of a State are to be deemed subject to the Government of the said State, whether their residence be permanent or temporary.

"3. The Rulers of States, by Comity, give to the laws of every people, which are in force within the territories of that people, effect everywhere [over matters that have arisen within that people's territories], so far as such laws do not prejudice the powers or rights of other governments or their citizens."

Exceptions.

173. There is certainly one exception (there are, perhaps, more exceptions) to this general rule that a State has full and absolute jurisdiction over all persons who are found within the boundaries of a State.

Case of Foreign Sovereigns.

An exceptional case arises when a foreign Sovereign (by which is meant here the individual person who is the actual chief of a foreign State) is travelling through other countries, or is temporarily resident therein*.

In such a case the foreign Sovereign is considered as entirely free from the law of the land, so far as regards its Civil jurisdiction. With regard to his liability to the law of the land for any crimes that he may commit therein, the better opinion seems to be that here also he is exempt from jurisdiction of the local tribunals, though the State whose hospitality he

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breaches of those laws wherever committed. This subject will be discussed elsewhere.

* 2 Phillimore, 120.

has abused, and whose laws he has outraged, may justly force him to leave its territory, and may compel the country of which he was the representative to make reparation for the wrong which he had committed. This immunity of a foreign Sovereign from local jurisdiction exists only where he is sovereign *de facto*, not where he merely claims to be Sovereign *de jure*. A Prince who has abdicated, or has been deposed, has no such rights*.

Ambassadors.

174. The ambassadors of a foreign State have a similar immunity from the jurisdiction of the local tribunals, criminal as well as civil†. The great preponderance of authorities is in favour of this position to its full extent, though some Publicists have drawn distinctions between an Ambassador's liability for *Mala in se*, and his liability for *Mala prohibita*. How a State may, and ought, to deal with an Ambassador who offends criminally against it, and how far the members of an Ambassador's suite partake in his privileges as to exterritoriality, are topics which will be best dealt with when we expressly discuss the rights and usages of Diplomatic intercourse between States.

* "Tout Souverain qui a abdiqué, ou a été dépouillé de l'autorité suprême, n'a plus aucun titre légal aux faveurs et aux droits internationaux. Toutefois les autres souverains restent libres, au gré de leurs convenances, de continuer à lui accorder les distinctions et les honneurs personnels auquels il avoit droit avant son abdication ou sa déchéance, alors surtout que cette dernière peut n'être pas irrévocable."—Calvo, vol. i. p. 641.

† 1 Calvo, 655 *et seq.* Woolsey, p. 149 *et seq.*

175. Certain privileges with regard to jurisdiction are granted by International Law to ships when within the ports of a foreign State. There are in this respect important distinctions between private vessels and public ships, which last class includes the armed and commissioned ships of a foreign State, and vessels chartered by a State to convey sovereign personages or their representatives*. It will be convenient to speak first of ships belonging to private persons.

Privileges of Foreign ships as to territorial jurisdiction.

Distinction between Private and Public vessels.

176. With respect to these (that is, to ships often called private vessels), "The general rule of Law is that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to

General rule as to Private Vessels.

* Woolsey, p. 101. The following passage from Calvo, as to what constitutes a ship of War (le bâtiment de guerre) may be useful:—"En principe ce qui constitue le bâtiment de guerre, ce n'est pas la force de l'armement, le nombre des canons, mais bien le fait de la possession par l'État, et du commandement par des officiers appartenant à l'armée de mer. Toutefois l'usage et les convenances mutuelles ont fait comprendre dans la catégorie des bâtiments de guerre les navires marchands affrétés spécialement et en entier pour le transport de troupes, de vivres, de rechanges ou d'autres objets appartenant au gouvernement et commandés par des officiers de la marine militaire.

"A la vérité, ces navires ne sont pas dans la stricte acception du mot des bâtiments de guerre, puisqu'ils n'appartiennent point à l'État et ne sont pas propres au combat; mais tant qu'ils sont exclusivement et intégralement employés au service de la marine militaire, tant qu'ils ne se livrent à aucune opération commerciale, ils sont assimilés aux bâtiments de l'État et autorisés comme tels à arborer le pavillon et la flamme de guerre."—Vol. i. p. 469.

speak, *territorial* waters (*mer littorale*) in which they lie."

177. The rule is thus stated, I believe correctly, by Sir R. Phillimore*; and it is fully established by the reasoning of the American Chief Justice Marshall in a very important case†, which is referred to by Sir R. Phillimore and other publicists as the leading case on the subject. In that judgment it is said that "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption."

Important American judgment establishing this rule.

178. There is, however, one great Maritime Power

* Vol. i. p. 372.

† The schooner 'Exchange' *v.* M^cFeddon and others, 7 Cranch's 'Reports,' p. 144.

whose jurists and judges maintain a doctrine which would introduce a very extensive exception to this general principle. The French regard it as a positive rule of International Law that, with regard to matters which occur on board private ships when in a foreign port, there is a distinction between offences committed by one or more of the crew against another or others of the crew which do not affect generally the peace and good order of the port, and, on the other hand, crimes and offences committed, even on board the ship, in any one of the three following cases :—

Peculiar doctrine of French Jurisprudence.

a. By any of the crew against strangers.

b. By strangers while on board of the ship.

c. By any of the crew against any other of the crew, if in this last-mentioned case the crime or offence be of such a nature as to distract the peace and good order of the port.

179. With respect to the last-mentioned class (em bracing the three cases just particularized), the French jurists admit the jurisdiction of the local tribunals over the private ship and her crew ; but with respect to the first-mentioned class (that in which an offence, committed by one against another of the crew, does not disturb the general good order of the port), the French jurists maintain that the vessel, though a private vessel, is to be considered as part of the territory of the nation to which she belongs, and that neither she nor her crew are, with regard to such offences, under the jurisdiction of the country within whose port the vessel is lying*.

* Wheaton's 'Elements,' vol. i. p. 172; 1 Phillimore, 374; Halleck, 172; Ortolan, 'Diplomatie de la Mer,' liv. 2, c. 13.

French decisions on the subject.

I will refer to two cases which will show to what an extent the French authorities have carried this doctrine.

Case of the 'Sally.'

One is a case in which an American merchant ship was lying in the harbour of Marseilles. The second officer of this ship inflicted a severe wound on one of the seamen who had disobeyed orders. The French Superior Court decided that the case was one for the jurisdiction of the American Consul, and not for that of the French Local Tribunals. The French judges admitted the general principle of the crew of a foreign merchant ship being amenable to the laws of the place in which she is lying, but pronounced that "the case is different with regard to offences committed on board of a neutral vessel by one member of the neutral crew against another of the same crew. In such a case the rights of the neutral power ought to be respected as taking action with regard to the internal discipline of the ship, in which no local authority ought to intrude its interference, so long at least as its aid and assistance are not demanded, and the tranquillity of the port is not compromised"*.

Case of the ship 'Forsaltning.'

180. In the other case to which I allude, the crime of poisoning was committed on board of the Swedish vessel 'Forsaltning,' while she was anchored in the river Loire. The French Government directed the French local court to deliver up the criminal to the proper authorities on board of his own ship †.

* Case of the 'Sally.' See the judgment in Ortolan. Its material parts are given by Wheaton, 1 El. 131. It is referred to more briefly by Kent, Com. p. 164, note (edition of 1858), and by Phillimore, vol. i. 375.

† Phillimore, p. 375.

181. M. Ortolan has given a skilful and elaborate statement of the reasons which, in his opinion, justify this doctrine of French jurisprudence. He draws the following distinctions between the position of a merchant ship, and that of an individual traveller or temporary resident within the territorial boundaries of a foreign country.

Reasons given by M. Ortolan for the French doctrine.

"On ne peut pas assimiler un navire de commerce et son équipage aux personnes isolées qui voyagent ou séjournent dans un pays étranger, et qui, par cela seul, pour tout ce qui concerne la police et la sûreté, sont entièrement soumises aux lois et aux autorités du pays dans lequel elles se trouvent.

"Bien que le navire de commerce ne soit pas une émanation, une représentation directe de la puissance de l'État auquel il appartient, néanmoins il contient une association organisée et régie intérieurement en conformité des lois de cet Etat; son équipage est enrôlé sous le contrôle de cet Etat; son capitaine ou patron est publiquement autorisé, et il est investi de certains pouvoirs.

"Il y a donc là une situation intermédiare, qui, si elle n'est pas celle de bâtiments de guerre, n'est pas non plus celle des simples particuliers, et qui laisse une certaine part d'attributions à deux souveraintés différentes: d'une part, celle des eaux territoriales dans lesquelles se trouve le navire; d'autre part, celle de l'État dont il a la nationalité. D'où il résulte que, si le navire de commerce est soumis aux lois et aux autorités de police et de jurisdiction locales,

ce n'est qu'avec un certain partage, selon les objets dont il s'agit, sous certaines restrictions *.

"Notre législation établit, quant aux faits qui se passent à bord des navires de commerce, dans un port ou dans une rade en pays étranger, une distinction entre—1° d'une part, les actes de pure discipline intérieure du navire, ou même les crimes ou délits communs commis par un homme de l'équipage contre un autre homme du même équipage, lorsque la tranquillité du port n'en est pas compromise; et 2° d'autre part, les crimes, ou délits commis, même à bord, contre des personnes étrangères à l'équipage, ou par tout autre que par un homme de l'équipage; ou même ceux commis par les gens de l'équipage entre eux, si la tranquillité du port en est compromise" †.

Opinions of Halleck.

182. General Halleck quotes and recognizes this doctrine of French jurists. Wheaton, in his 'Elements of the Law of Nations,' explains it, but gives his opinion that the French courts in this respect give to merchant vessels greater privileges than are required by the general principles of International Law. But Mr. Lawrence states that Mr. Wheaton subsequently, in a review of M. Ortolan's work, admitted the distinctions established by French jurisprudence to be sound in principle, and such as ought to be recognized by all nations ‡.

Wheaton.

The distinctions not generally recognized.

183. They certainly have not hitherto been generally recognized by Publicists. M. Ortolan's main reason

* Ortolan, 'Diplomatie de la Mer,' liv. 2, c. 13.

† P. 172.

‡ Vol. i. p. 129.

in support of them appears to be inconclusive. He urges that the merchant ship, though not altogether a public vessel, has received an organization and rules of conduct for her crew from the Government of her own nation, which she bears with her wherever she may be, and that she has therefore always and everywhere a jural connexion with her own State. But the same might be said of the members and agents of many trading companies who visit, and are commorant in foreign countries for the purposes of the commerce or other speculation, which their own Government has sanctioned, and which they carry on to a certain extent under their own Government's control. But such persons are unquestionably fully subject to the laws of the foreign State while resident within its boundaries; and it is difficult to see what principle can make the men on board of a merchant ship in the harbour independent of the local laws, in any case where they would be under them if trading or residing ashore.

Reasons against these distinctions.

184. It is observable that in both the cases of the 'Sally' and the 'Forsaltning' the French courts decided against French jurisdiction. I am not aware that there is any case in which France has compelled, or even required, the courts of any other nation to abandon the trial of offences committed by members of the crews of French merchant ships within the territorial waters of such nation. The difference is material. A State gives others no fair ground of offence when she merely disclaims rights, the exercise of which would be in favour of her own authority. Unquestionably the reasoning of the French tribunals went much

Real effect of the French decisions.

further; but "alphabets wound not," and this may have passed unheeded without the silence of other States being taken to give assent to it. This is the view apparently taken by the editor of the ninth edition of Kent's 'Commentaires.' He says of the cases of the 'Sally' and of another vessel that "these cases show a liberal relaxation of the strict rights of the local jurisdiction" *.

185. In practice it would be unwise and offensive for the local authorities of a seaport-town to interfere in every case of petty assault or the like that occurred on board a foreign merchantman in the harbour. And, on the other hand, it is always to be remembered that the French jurists strongly uphold the right of the local tribunals to take cognizance of all crimes which disturb the general peace and good order of the port.

Clear recognition of rights of local tribunals when the general peace is disturbed.

M. Ortolan cites fully a case in which crimes of serious magnitude were committed on board an American ship in French waters by one of the ship's officers against two of the ship's crew, so as to cause great disturbance and excitement in the harbour; and thereon the French local authorities took prompt action in the case, and sent the accused party for trial before the Court of Assizes of the Lower Seine. The French Court of Cassation upheld the legality of these proceedings †.

* Vol. i. p. 164, note.

† "Il s'agissait d'un bâtiment américain, à bord duquel le second avait tué de sa main un de ses matelots et en avait blessé un autre grièvement. La tranquillité du port avait été profondément troublée, et l'émotion populaire s'était même propagée dans la ville,

186. We have now to consider the *status* of Ships of War when within foreign territorial waters; and this is a subject of much doubt and difficulty, which

Status of foreign ships of war.

par suite de la surexcitation des équipages des autres navires américains en grand nombre dans le port."—Ortolan, vol. i. p. 275. M. Ortolan gives, in his 'Annexe J,' a full report of the decree of the Court of Cassation, some portions of which I subjoin. They certainly give the impression that the learned French judges who pronounced them would have declared differently from their predecessors in cases such as those of the 'Sally' and the 'Forsaltning.'

"Attendu que les bâtiments de commerce entrant dans le port d'une nation autre que celle à laquelle ils appartiennent ne pourraient être soustraits à la juridiction territoriale, toutes les fois que l'intérêt de l'État dont ce port fait partie se trouve engagé, sans danger pour le bon ordre et la dignité du gouvernement;

"Attendu que tout État est intéressé à la répression des crimes et délits qui peuvent être commis dans les ports de son territoire, non-seulement par des hommes de l'équipage d'un bâtiment du commerce envers des personnes ne faisant pas partie de cet équipage, mais même par des hommes de l'équipage entre eux; soit lorsque le fait est de nature à compromettre la tranquillité du port, soit lorsque l'intervention de l'autorité locale est réclamée, soit lorsque le fait constitue un crime de droit commun que sa gravité ne permet à aucune nation de laisser impuni, sans porter atteinte à ses droits de souveraineté juridictionnelle et territoriale, parce que ce crime est par lui-même la violation la plus manifeste comme la plus flagrante des lois que chaque nation est chargée de faire respecter dans toutes les parties de son territoire;

"Attendu qu'un souverain étranger n'a aucun intérêt à revendiquer qu'il soit fait exception à l'application de ces principes en faveur des bâtiments de commerce, à moins de traités spéciaux intervenus entre États et dans les limites de ces traités, puisque ces bâtiments, naviguant en dehors de leur territoire pour fair le commerce, ne sont pas engagés dans les affaires publiques, ne sont occupés que d'intérêts privés, et que les équipages qui les composent, ne sauraient avoir droit à d'autre protection que celle que pouvait invoquer une personne privée;

Geneva Arbitration.

the proceedings in the recent Geneva Arbitration have served rather to exhibit than to settle.

No practical difficulty felt about this formerly.

187. Ships of War used always to be treated, in point of fact, as exempt from all foreign jurisdiction whatever, whether they were on the high seas or within the territorial waters of a foreign State. The rule was generally laid down by text-writers, without discriminating whether the right of war-ships to exterritoriality was a perfect right, or a privilege dependent on the Comity of Nations only. This important question arose (with many others) in the "Alabama" controversy. I shall have repeated occasion to refer to that memorable international litigation, on coming to the subject of the effect of a state of warfare on the rights of Neutrals. But it is desirable and useful to address ourselves now to those portions of it in which the general principle was discussed whether the rights of a ship of war in foreign ports are perfect rights, or whether they are precarious privileges dependent upon the Comity of Nations. A further question arose, which also it will be proper not to pass unnoticed in this chapter—namely, whether, supposing them to be based on the Comity of Nations, there is or is not such a *primâ facie* presumption of a general agreement to allow them that they cannot be

How the question arose in the "Alabama" controversy.

"Attendu que, dès lors, à l'exception de ce qui concerne la discipline et l'administration intérieure du bord, dans lesquelles l'autorité locale ne saurait s'ingérer et pour lesquelles il y a lieu de respecter les droits réciproques concédés par un usage général entre les diverses nations, les bâtiments de commerce restent soumis à la juridiction territoriale."

lawfully disregarded and refused without notice of withdrawal or of disallowance being first given.

188. On the British side it was contended that these rights are Perfect Rights. And this is the view of the subject taken in the celebrated judgment of Sir A. Cockburn, parts of which I will proceed to quote. It will be seen that by some of the authorities which he cites, the right of exterritoriality is dealt with as arising out of the Comity of Nations; but most of the authorities adopted by him treat it as a perfect right. The same judgment, however, deals with the alternative, and lays down that, even if the right to exterritoriality depended on Comity only, the right ought not to be denied and the ship interfered with, unless clear warning had been given that the Neutral refused to that ship the Comity usually allowed to foreign ships of war. Sir A. Cockburn's words are as follows* :—

Sir A. Cockburn's judgment.

"It is a familiar principle of International Law that the ships of war of a State are entitled to the privilege of exterritoriality. This is a point on which leading publicists are agreed. Wheaton, in his 'Eléments de droit International,' writes, 'Une armée ou une flotte appartenant à une puissance étrangère, et traversant ou stationnant dans les limites du territoire d'un autre État, en amitié avec cette puissance, sont également exemptes de la juridiction civile et criminelle du pays.

"'Il s'ensuit que les personnes et les choses qui, dans ces trois cas, se trouvent dans les limites du territoire

* Blue Book, p. 149.

Sir A. Cockburn's judgment.

d'un État étranger, restent soumises à la juridiction de l'État auquel elles appartiennent, comme si elles étaient encore sur son territoire.

"'S'il n'y a pas de prohibition expresse, les ports d'un État sont regardés comme étant ouverts aux navires de guerre d'une autre nation avec laquelle cet État est en paix et amitié. Ces navires, entrés dans les ports étrangers, soit en vertu de l'absence d'une prohibition, soit en vertu d'une autorisation expresse, stipulée par traité, sont exempts de la juridiction des tribunaux et des autorités du lieu.'

Sir A. Cockburn's judgment.

"Heffter declares ships of war to be exempt from the territorial jurisdiction of the country within whose waters they are. Sir R. Phillimore writes as follows:—'Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction. Whether this privilege be founded upon strict international right, or upon an original concession of Comity with respect to the State in its aggregate capacity, which, by inveterate practice, has assumed the position of a right, is a consideration of not much practical importance. But it is of *some* importance; for if the better opinion be, as it would seem to be, that the privilege in question was originally a concession of Comity, it may, on due notice being given, be revoked by a State so ill-advised as to adopt such a course, which could not happen if it were a matter of natural right. But, unquestionably, in the case of the foreign ship of war, or of the foreign Sovereign and Ambassador, every State which has

not formally notified its departure from this usage of the civilized world, is under a tacit convention to accord this privilege to the foreign ship of war lying in its harbours.' No writer has, however, discussed the subject with so much clearness and force as M. Ortolan in his 'Diplomatie de la Mer:'— Sir A. Cockburn's judgment.

"'Les bâtiments de guerre armés par l'État lui-même et pour sa défense, en sont les représentants à l'étranger; leur commandants et leur officiers sont comme des délégués du pouvoir exécutif, et sur quelques points du pouvoir judiciaire de leur pays. Ces bâtiments doivent donc participer pleinement à l'indépendance et à la souveraineté de la puissance qui les arme; ils ont droit aux respects et aux honneurs qui sont dus à cette souveraineté; c'est ce que reconnaissent et ce que commandent les lois internationales.

"'Par cela seul que les bâtiments de guerre sont armés par le Gouvernement d'un État indépendant, auquel ils appartiennent, que leurs commandants et leurs officiers sont des fonctionnaires publics de cet État et en exercent la puissance exécutive, en certains points même la puissance judiciaire, enfin que tout individu faisant partie de leur équipage, sans distinction de grade, est un agent de la force publique, ces bâtiments, personnifiés, sont une portion de ce Gouvernement et doivent être indépendants et respectés à son égal.

"'Ainsi; quel que soit le lieu où ils se trouvent, qui que soit au monde, étranger au Gouvernement auquel ils appartiennent, n'a le droit de s'immiscer en

Sir A. Cockburn's judgment.

rien dans ce qui se passe à leur bord, et encore moins d'y pénétrer par la force.

"'On exprime généralement cette règle par une métaphore passée en coutume, et tellement accréditée, tellement traditionnelle, que dans la plupart des esprits elle est devenue comme une raison justificative de la proposition dont elle n'est véritablement qu'une expression figurée. On dit que tout bâtiment de guerre est une partie du territoire de la nation à laquelle il appartient; d'où la conséquence que même lorsqu'il est dans un port étranger, les officiers, l'équipage et toute personne quelconque qui se trouve à son bord, est censée être, et que tout fait passé à bord est censé passé, sur ce territoire. C'est par une continuation, par une expression résumée de la même figure, qu'on appelle ce privilège la privilège ou le droit d'exterritorialité.'" Sir A. Cockburn proceeds to say:—

Sir A. Cockburn's judgment.

"The matter is so well handled by this able writer that I am induced to cite one or two more passages: —'Ce qui est vrai, c'est que le navire est une habitation flottant, avec une population soumise aux lois et au Gouvernement de l'État dont la navire a la nationalité, et placée sous la protection de cet État. Ce qui est vrai, c'est que si le navire est bâtiment de guerre, il est, en outre, une forteresse mobile portant en son sein une portion même de la puissance publique de cet État, des officiers et un équipage qui forment tous dans leur ensemble un corps organisé de fonctionnaires et d'agents militaires ou administratifs de la nation.

"'S'il s'agit de navires de guerre, la continue inter-

nationale est constante; ces navires restent régis uniquement par la souveraineté de leur pays:—Les lois, les autorités, et les juridictions de l'État dans les eaux duquel ils sont mouillés leur restent étrangères; ils n'ont avec cet Etat que des relations internationales par la voie des fonctionnaires de la localité compétents pour pareilles relations. Sir A. Cockburn's judgment.

"'Le navire de guerre portant en son sein une partie de la puissance publique de l'État auquel il appartient, un corps organisé de fonctionnaires et d'agents de cette Puissance dans l'ordre administratif et dans l'ordre militaire, soumettre ce navire et le corps organisé qu'il porte aux lois et aux autorités du pays dans les eaux duquel il entre, ce serait vraiment soumettre l'une de ces Puissances à l'autre; ce serait vouloir rendre impossibles ces relations maritimes d'une nation à l'autre par bâtiments de l'État. Il faut ou renoncer à ces relations, ou les admettre avec les conditions indispensables pour maintenir à chaque État souverain son indépendance.

"'L'État propriétaire du port ou de la rade peut, sans doute, à l'égard des bâtiments de guerre, pour lesquels il aurait des motifs de sortir des règles ordinaires et pacifiques du droit des gens, leur interdire l'entrée de ces eaux; les y surveiller s'il croit leur présence dangereuse, ou leur enjoindre d'en sortir, de même qu'il est libre quand ils sont dans la mer territoriale, d'employer à leur égard les moyens de sûreté que leur voisinage peut rendre nécessaires; sauf à répondre envers l'État auquel ces vaisseaux appartiennent, de toutes ces mesures qui pourront être, suivant

Sir A. Cockburn's judgment.

les événements qui les auront motivées ou la manière dont elles auront été exécutées, des actes de défense ou de précaution légitime, ou des actes de méfiance, ou des offenses graves, *ou même des causes de guerre*, mais tant qu'il les reçoit, il doit respecter en eux la souveraineté étrangère dont ils sont une émanation; il ne peut avoir, par conséquent, la prétension de régir les personnes qui se trouvent et les faits qui se passent à leur bord, ni de faire sur ce bord acte de puissance et de souveraineté.'

Sir A. Cockburn's judgment.

"In the case of the 'Exchange,' reported in Cranch's Reports (vol. vii. pp. 135–147), the principle that a vessel bearing the flag and commission of a belligerent Power was not within the local jurisdiction of the neutral law, though claimed by citizens of the neutral country as having been forcibly taken from them as prizes, contrary to international law, was fully upheld on appeal by the Supreme Court of the Unites States.

"'By the unanimous consent of nations,' says Chief Justice Marshall, 'a foreigner is amenable to the laws of the place; but certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign Sovereign entering a port open for their reception. It seems, then, to the Court to be a principle of public law that national ships of war entering the port of a friendly Power open for their reception are to be considered as exempted by the consent of that Power from its jurisdiction.'

Sir A. Cockburn's judgment.

"It has been ingeniously attempted by the Counsel of the United States to place the decision in this case

and the judgment of Chief Justice Marshall on the footing that a neutral Court has no jurisdiction over a belligerent vessel as a matter simply of judicial authority; but this is not so, the eminent Judge who delivered the judgment in that case places the matter not on the footing of jurisdiction in a judicial point of view, but as one of international right. In proof of which the following passages are deserving of the fullest attention:— Sir A. Cockburn's judgment.

"'A *nation* would justly be considered as violating its faith, although that faith may not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial powers in a manner *not consonant to the usages and received obligations of the civilized world.* . . . . . .

"'If, for reasons of State, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of war of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace. . . .

"'But in all respects different* is the situation of a public armed ship. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the Sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from

* This refers to private vessels coming under local jurisdiction. See the intervening passage in the original judgment, p. 144, 7 Cranch, 'Supreme Court Reports.'

Sir A. Cockburn's judgment.

being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court ought to be construed, as containing *an exemption from the jurisdiction of the Sovereign* within whose territory she claims the rights of hospitality.' "

189. On the other hand, the joint judgment delivered by four of the Arbitrators declares:—that

Judgment of other Arbitrators.

"The Privilege of Exterritoriality accorded to vessels of war has been admitted into the Law of Nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations;"

And that "The absence of a previous notice cannot be regarded as a failure in any consideration required by the Law of Nations, in those cases in which a vessel carries with it its own condemnation."

190. In the statement delivered by Count Sclopis, the President, before the tribunal, these passages occur*:—

Count Sclopis's statement.

"If we consult the most esteemed authors on public International Law, and especially two writers of great weight, whose authority will be denied neither by America nor by England, namely, Story and Phillimore, we find that the privilege, usually accorded to ships of war, of being considered as a portion of the

* Blue Book, p. 207.

I have not quoted any reasonings based on the language of the Three Special Rules on which the Arbitrators were required to act.

State whose flag they carry, and being thus exempt from all other jurisdiction, was in its origin a privilege only granted by courtesy. As this privilege is only derived from the usage of nations, it can be cancelled at any moment without cause for offence being given."

Count Sclopis's statement.

"The opinion of Story, delivered in the case of the 'Exchange,' and quoted by Phillimore, appears to me decisive :—

"'It may,' he says, 'be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a Sovereign are amenable to the jurisdiction, to himself, or his Court; and that the exceptions to this rule are such only as by common usage and public policy have been allowed in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange if a license implied by law from the general practice of nations for the purposes of peace should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship by the same implication impose upon those who seek an asylum in our ports.'"

191. In the statement of Mr. Adams on the same subject, it is said :—

Mr. Adams's statement.

"On behalf of Great Britain it is claimed that the rule is perfectly established that a vessel belonging to any Power, recognized as sovereign or as a belligerent, has, in virtue of its commission, a right to claim a

Mr. Adams's statement.

reception and the privilege of extra-territoriality, without regard to its antecedents, in the ports of every neutral Power.

"*The authorities quoted to sustain this position sustain it as an established general rule. I see no reason to question it. But the question that has been raised in the present controversy is an exceptional one, which is not touched by these decisions.*"

Mr. Adams then enters into arguments to show that the 'Alabama,' the 'Shenandoah,' and other vessels whose origin and conduct were discussed before the Geneva Tribunal, were not *bonâ fide* foreign ships of war at all, and that the Commissions held by them ought to have been regarded as nullities. But he proceeds also to consider the case on the hypothesis of their commissions having been real, but of these ships having abused the amity of England, and of their having been engaged in gross violations of the Laws of Great Britain and of International Law. He gives his opinion, that by "such fraudulent abuse of the amity of England, by thus setting at defiance England's laws within its own jurisdiction, the perpetrators of such conduct had not only forfeited all right to consideration, but had subjected themselves to the penalties of malefactors if ever they returned within the jurisdiction which they had insulted." He considers that to deny the right to exclude vessels from British ports on these grounds without regard to their commissions "would place every sovereign power at the mercy of every adventurous pirate on the ocean, who might manage to cover himself

with the threadbare mantle of the minutest belligerent. Mr. Adams's statement.

"It is a perfectly well understood principle of law that no citizen of a foreign nation, excepting perhaps, in certain cases, a representative clothed with diplomatic privileges, is free from the obligation of conforming himself to the laws of the country in which he is residing. If he wilfully violates them, he is subject to the same penalties which are imposed upon native citizens. Even though not a citizen, he is subject in Great Britain to be tried for quasi-treason. If, instead of conspiring against the Queen, he enters into combinations which involve the Kingdom in complications with foreign Powers with which it is at peace, he surely cannot come forward and plead the possession of a commission from the authorities of his country in his justification. Neither is the commander of a ship of a foreign power which comes within the harbour of another, free from the same general obligation. If he violates any of the regulations prescribed for his government, he is liable to pay the penalty by a withdrawal of his privileges, or by an immediate order of exclusion from the port. For myself, therefore, I cannot see any reason why the existence of a commission should have stood in the way of a clear expression of Great Britain of its sense of the indignities heaped upon Her Majesty's Government by the violation of her laws within her various dominions, continuously persisted in during the existence of this belligerent. In my opinion it would have justified the seizure and detention of the

offending vessels wherever found within the jurisdiction. *But if that were considered inconsistent with a clear impartiality, it certainly demanded an entire exclusion from Her Majesty's ports*"*.

Some Principles deducible from these judgments, as to which all are agreed.

192. These Judgments show considerable clashings of high intellects in high places. Nevertheless there are some propositions, material for our present purpose, which they agree in establishing or confirming; and there are other matters as to which they give us valuable lights (though they are cross lights), by which we may be aided in forming (as we are obliged to form) independent views of our own.

A general Right to Exterritoriality (whether the Right be a Perfect Right, or "Ex Comitate only") admitted by all to exist, subject to two exceptions; on which all agree.

193. Whether we regard the right of a Foreign Ship of War to the privilege of exterritoriality as essentially a Perfect Right, or whether we regard it as dependent on Comity only, and therefore as amounting to no more than a Moral Right, such right ought to be allowed and respected, unless (1) notice has been given of its disallowance, or (2) unless the Foreign Ship, after admission to the Port, grossly abuses her privilege of admission to the Port for purposes violently aggressive, internationally illegal, and flagrantly injurious to the State whose hospitality she enjoys.

A Third case

Thus far all are agreed. But a third state of things

* See "Statement of Mr. Adams" in the Blue Book (North America, No. 1, 1873), p. 200. The arguments of counsel on the American side as to this subject will be found in pages 152 and 451 of the Report of "The Argument at Geneva," published by the American Government. Arguments on the British side will be found on pages 296 and 427 of the same volume. See also "British Counter Case," Blue Book (North America, No. 4, 1872), p. 18 *et seq.*

may arise, which (or the hypothesis of which) created much of the discussion in the Alabama question. It may happen that the so-called Foreign Ship of War is tainted by some congenital fraud as to her equipment, and as to the mission on which she navigates, and that she has only come into existence as a war ship by means of a violation of the laws of the very Nation whose ports she enters. Some of the high authorities, who took part in the Geneva argument and decision (including a majority of the Arbitrators), maintained that under such a condition of circumstances the offending vessel has no right to be treated as a *bonâ fide* Foreign ship of war, that she has no privilege of exterritoriality, and that no notice of refusal or withdrawal of any privilege is in her case necessary.

of Exceptions is asserted by some authorities but denied by others.

The judgment of Sir Alexander Cockburn (as already quoted in these pages) contains the fullest exposition of the contrary opinion; and it will be seen that the American Arbitrator, Mr. Adams, though he does not withdraw from the position taken by the majority of his colleagues, namely that such a vessel has no right to any privilege of exterritoriality, and that no notice of denial or withdrawal of it is necessary, yet evidently considers that the best course in such a case would be to give such notice, a warning not to enter the Port being sufficient notice.

194. The question of notice being or not being necessary forms the main practical question. But no one asserts that the Privilege of Exterritoriality is universal or perpetual: all agree that this Privilege may

Question of Notice or no Notice the main practical question.

be denied or withdrawn upon due notice*. By "due" notice I mean a notice sufficient as to time and circumstance, so that it shall be impossible for those in command of the ship in question reasonably to allege that they were entrapped into entering or remaining in the port by a belief that the customary privileges would be extended to their vessel. The real motive, the *causa suasoria*, of such a denial or withdrawal of exterritoriality might be frivolous, or it might be even vexatious; but if due notice were given, it would only amount to cause for moral complaint of want of the *Comitas Gentium*. It would be like the withdrawal and refusal of rights usually allowed to foreigners to travel, or reside, or carry on commerce—a species of that *Xenelasia*, which we shall speedily have occasion to speak of as being within the strict right of a State to enforce, however alien it may be from that spirit of Comity by which, as a matter of moral right, the conduct of nations towards each other ought to be regulated.

Means for forming an opinion.

195. The copious extracts which I have made from the 'Alabama' judgments, and the arguments of counsel which I have referred to, give the reader full materials for coming to an opinion of his own whether the Right of Exterritoriality is a mere privilege granted *ex comitate*, in which case it may be refused without notice, provided that under the circumstances those commanding the ship in question have not been

* This is not to be misunderstood as meaning that a neutral State may treat the war ships of one Belligerent less favourably than the war ships of the other Belligerent.

unfairly deluded into the belief that they would be allowed the privilege—or whether the Right of Exterritoriality is a Perfect Right, in which case it certainly cannot be legally withdrawn without notice, save and except in the possible case that the Foreign War ship, after her admission to the port, is guilty of such outrageous violations of the local law and International Law that prompt action against her, without any formality of notice, is absolutely necessary. I do not purpose to enter on the arduous and presumptuous function of balancing and criticising the arguments used by or before those high authorities who gave judgment at Geneva. But to give no opinion at all might be taken to imply that I think the reasoning on the two sides to be of equal weight, whereas I believe the arguments on this subject brought forward by Sir Alexander Cockburn to preponderate greatly over what has been said by the eminent Jurists who differed from him. At the same time I may state that, according to the principles of Utilitarianism (to which the greatest heed should be paid in all cases of real difficulty and doubt in International Law *), it will be practically best to follow the course evidently preferred by Mr. Adams, and to give notice of denial of the privileges of Exterritoriality to all war ships of the character which the opinion of the great majority of the members of the Geneva Tribunals (if not all of them) ascribed to the 'Alabama.' This would be just and desirable, whether Perfect Right or the *Comitas Gentium* is regarded; and by following such

As a matter of practical utility such notice should be given and acted on, as Mr. Adams pointed out.

* See *supra*, chapter 3.

a course no foundation would be given for any reasonable complaint of disregard of Positive International Law, or neglect of International courtesy and fairness.

Right of exemption from Local Laws does not extend to misconduct of crews on shore.

196. Whatever may be the extent of the immunity from local law to which the crew and others officially employed on board of a war ship are entitled while she is in foreign territorial waters, such privilege does not extend to misconduct commited on shore. Calvo quotes an award of the King of the Belgians, upholding the jurisdiction of the authorities of Rio Janeiro over certain officers of the English ship 'La Forte' in respect of matters which had occurred on land*. Bluntschli (p. 194) states that when any of the officers or crew of a foreign ship of war go ashore, and commit offences there, they are subject to the ordinary tribunals of the place; but the matter ought to be brought to the notice of the commanding officer of the offenders, and measures should be taken in concert with him for the punishment of the offenders, either by the local tribunals or by the military authorities of the ship. "According to strict reasoning, the exclusive jurisdiction of the local tribunals ought to be maintained; but the desire of keeping on friendly terms with other nations has caused in such a case an extension of the maritime jurisdiction of the foreign state to which the ship of war belongs."

Ortolan's words are :—" Mais si c'est à terre en pays étranger que des individus, quels qu'ils soient, appartenant aux états-majors ou aux équipages des bâtiments

* Calvo, i. p. 794.

de guerre, se rendent coupables d'infractions aux lois de ce pays, nul doute que les autorités locales n'aient le droit de s'en emparer, tant qu'ils sont à terre, et de les livrer aux tribunaux de leur nation pour être jugés et punis suivant ces lois"*.

Extent of a Foreign War-Ship's Privilege of Exterritoriality.

197. On board of the foreign war-ship the local tribunals have no jurisdiction whatever. The privilege of exterritoriality not only operates to the exemption of those on board of her from the action of the local criminal tribunals as to charges of crime committed by members of her crew or other regular officials on board of her, but it forbids the local tribunals from serving any judicial process or exercising any act of jurisdiction on board of her. Locally she may be within the limits over which such Courts have power; but jurally she is to them foreign territory into which they have no right to intrude their writs, their officers, or any badge of their authority. This is laid down very explicitly by Ortolan; his words are as follows:—"Les commandants des bâtiments de guerre doivent réserver aux tribunaux de leur pays la connaissance des crimes ou délits commis à leur bord, même dans des eaux étrangères, non-seulement lorsque la répression de ces crimes ou délits touche au commandement militaire, mais aussi dans tout autre cas." He proceeds to state that "Les autorités étrangères du port ou de la rade où est mouillé le navire de guerre n'ont aucun droit de venir à bord faire aucun acte de police, d'arrestation *ou de juridiction quelconque*, soit pour les faits

The local Courts ought in no way to take action on board of her.

Ortolan's words as to this.

* Ortolan, 'Diplomatie de la Mer,' p. 208.

passés à bord de ce navire, soit pour tous autres ; les navires de guerre étant totalement exempts de la juridiction étrangère."

Calvo's statement of same doctrine.

198. Calvo is equally explicit as to "the Principle which under all circumstances exempts ships of war from the jurisdiction, civil as well as criminal, of the tribunals of the foreign State where they are anchored." He says that "pénétrer à leur bord par force est une violation de pavillon, qui peut entraîner les plus graves conséquences, et justifierait pleinement une rupture de relations entre deux États"*.

Practical importance of caution in this matter.

199. This caution as to the Local Tribunals abstaining from all attempts, even from attempts to effect service of their processes, on board of foreign ships of war, is a matter of practical importance. Not very many years ago a judge of a local court in one of our colonies ordered a writ of summons in a suit brought in his court to be served on the defendant and alleged debtor, who was at the time on board of a foreign war-ship in the harbour, the harbour being locally included within the District-Court's jurisdiction. The commander of the man of war refused to allow the process-server to come on board. That official endeavoured to force his way in ; and when he was repelled, the local judge sent him back with a threat that the military force of the port (a garrison town) should be called in to aid and assist the civil authorities. The captain of the foreign man of war replied by ordering his guns to be loaded, and his decks to be cleared for action. On the commandant of the port hearing of the

* Vol. i. p. 676.

apprehended disturbance, he prudently and properly counselled the angry local judicial dignitary to give up his attempt to serve the process, and the matter passed off quietly.

Possible distinction between the services of various kinds of Process.

200. Perhaps an attempt might be made to distinguish between the services of various kinds of process. In most cases the process is only effective, if served within the actual territory over which the local court has jurisdiction. Under such circumstances the attempt to serve such process on board of the foreign man of war is a clear denial of the ship's extra-exterritoriality, and might be properly resented as a national insult. But there are also cases, where a Court directs summonses to appear, or notices to return to be served avowedly in foreign territory on subjects who belong to the nation to which the Court itself belongs. In such cases, if an attempt were made to serve process on board of a foreign war-ship, it might be said that there was no denial of the war-ship's extra-territoriality, and that consequently no offence ought to be taken. But it is apprehended that even in such cases the Sovereign of the foreign territory, or his representative in detached parts of it, must be held to give, by the Comity of Nations, an implied assent to the action of the Court whence the summons or other analogous process emanates. Such sanction might be refused or withdrawn. At any rate, to avoid the risk of armed collision, and possible warfare, it is clearly best on all principles of general expediency for local tribunals not to attempt the exercise of any jurisdiction on board of foreign ships of war.

Best to avoid all attempts to exercise local jurisdiction.

Nations have a Perfect right to impose restrictions on foreign commerce, and on the access of foreigners to their territories.

201. The perfect Right of a State to Independence gives it the power, according to Positive International Law, to make what regulations it pleases as to its trade and its commerce with other nations. It may place what restrictions it thinks fit on the access of foreigners to its coasts or to its interior territories for mercantile or for any other purposes. It may do this without being considered to inflict by those restrictions such an injury as amounts to a *Casus Belli*; though undoubtedly the withdrawal of ancient courtesies and of indulgences which had become matters of long custom, would be a breach of the Comity of Nations, especially if similar indulgences were still allowed to the members of other Foreign States. But no *Casus Belli* would arise. The State or States towards which such exclusion was practised, must retaliate only by refusing in turn to the denying Nation all courtesies and beneficial intercourse under the Comity of Nations *.

The withdrawal of customary indulgences on such subjects may be a breach of the Comity of Nations, but does not amount to a *Casus Belli*.

A State has an absolute right entirely to prohibit the access of foreigners and foreign commerce.

202. A State's perfect right to regulate and restrict the commerce of foreigners with it, and their access to its territories, extends also to an absolute Right to

* "The Violation of Rights *stricti juris* may be redressed by forcible means, by the operation of war, which in the community of nations answers to the act of the Judicial and Executive Power in the community of individuals. But the departure from the usage of Comity cannot be legally redressed by such means. The remedy, where expostulation has failed, must be a corresponding reciprocity of practice on the part of the nations whose subjects are so treated. "Illud quoque sciendum est," observes Grotius, "si quis quid debet, non ex justitiâ propriâ, sed ex virtute aliâ, puta liberalitate, gratiâ, misericordiâ, dilectione, id sicut in foro exigi non potest, ita nec armis deposci."—1 Phillimore, p. 161.

forbid foreign commerce, and the access of foreigners altogether. Attempts have been sometimes made to call in question the right of any one nation thus to isolate itself from the rest of mankind, and to renew the churlish spirit of the Xenelasia, by which ancient Sparta strove to keep its peculiar institutions intact and uncorrupted. But the balance of authority is clearly in favour of the existence of such a strict right; and the balance of convenience is in its favour also. The annoyance and disappointment, which the speculative and inquisitive members of other States may suffer by such exclusions (exclusions which from the nature of things, and from human nature, have always been and always must be of very rare occurrence), are trifling in comparison with the mischief, with the amount of quarrelling and hostility, which would be caused, if a strong adventurous State had a right under pretext of general good, of the advancement of civilization or the like, to send its ships or its subjects into another State against that other's will. For authorities on the subject I will cite Sir George Bowyer and Vattel. The first says:—"A State may, without violation of international law, exclude all foreigners from its territories; though there may be particular cases in which to exclude them would be cruel, and contrary to the common duties of humanity" *.

Authority and expediency are in favour of this doctrine.

Bowyer's statement on the subject.

Vattel's words are as follows †:—"Le Souverain peut défendre l'entrée de son territoire, soit en général

Vattel.

* Bowyer, 'Public Law,' p. 173. He refers to Vattel, as cited in the text, and to Puffendorf, 'Droit des Gens,' l. 3, ch. 3, § 8.

† Liv. 11. c. vii. § 94.

à tout étranger, soit en certains cas, ou à certaines personnes, ou pour quelques affaires en particulier, selon qu'il le trouve convenable au bien de l'État. Il n'y a rien là qui ne découle des droits de domaine et d'empire; tout le monde est obligé de respecter la défense; et celui qui ose la violer, encourt la peine décernée pour la rendre efficace. Mais la défense doit être connue, de même que la peine attachée à la désobéissance; ceux qui l'ignorent doivent être avertis, lorsqu'ils se présentent pour entrer dans le pays. Autrefois les Chinois, craignant que le commerce des étrangers ne corrompît les mœurs de la nation, et n'altérât les maximes d'un gouvernement sage, mais singulier, interdisaient à tous les peuples l'entrée de l'empire. Et cette défense n'avait rien que le juste, pourvu que l'on ne refusât point les secours de l'humanité à ceux que la tempête, ou quelque nécessité contraignait de se présenter à la frontière. Elle était salutaire à la nation, sans blesser les droits de personne ni même les devoirs de l'humanité, qui permettent en cas de collision de se préférer soi-même aux autres."

Contrary opinions to be found in Grotius.

203. Vattel's clear doctrine on this subject ought to be taken as overruling the inferences which might be drawn from some of the expressions in the second book of Grotius, chapter 2, sections from xiii. to xxiv. inclusive. Great part of the observations of Grotius apply to claims of transit for persons and for goods through a State's territory. He makes also distinctions as to various incidents in traffic and in commorancy in a foreign territory, which distinctions it would be very difficult to maintain in practice, and which,

therefore, it would be inexpedient to recognize in theory. Thus he would give the foreigner a right to purchase necessaries, but not superfluities; and, even as to necessaries, it would be open for the native rulers to stop the traffic if the natives had special need of such articles. Grotius would not give the foreigner any absolute right at all to sell his (the foreigner's) goods, as it always ought to be in the choice of every party to decide what he will acquire and what not.

Heffter's Rules

204. Heffter, in his essay, 'Le Droit International,' has denied the right of a State to isolate itself completely as to commercial transactions*. Heffter's proposed rules on the subject are very correctly stated by Principal Woolsey, who accompanies his statement of them with comments and limitations so very sensible and just that I will cite them collectively.

as modified by Woolsey.

Principal Woolsey has inserted a passage in the commencement of his own work in which he draws the conclusion that "Sovereignty, in the strictest sense, authorizes a nation to decide upon what terms it will have intercourse with foreigners, and even to shut out all mankind from its borders." In his third chapter he reverts to this topic and observes as follows:—

"And yet some kind of intercourse of neighbouring States is so natural, that it must have been coeval with their foundation, and with the origin of law; it is so necessary, that to decline it involves often extreme inhumanity; it is so essential to the progress of mankind, that unjust wars have been blessings when they opened nations to one another. There

* P. 67.

could, of course, be no international law without it. The following maxims relating to the so-called right, are, in substance, laid down by Heffter.

"'1. Entire non-intercourse shuts a nation out from being a partner in International Law. [This, however, is not true, if International Law is taken in its broadest sense; for to treat a nation or its subjects, when these latter are fallen in with, as having no rights, because they have no intercourse with us, is not only inhuman but unjust.]

"'2. No nation can, without hostility, cut off another from the use of necessaries not to be obtained elsewhere. [But necessaries must not be confounded with articles highly desirable.]

"'3. No State has a right to cut another off from the innocent use of its usual ways of communication with a third State.' The older writers called this the *jus transitus* or *jus passagii innoxii*; but they disputed whether it is a perfect or imperfect right. Only necessary wants create a definite right. The refusal of something merely useful to one party, to grant which does the other no harm, is at most an unfriendly procedure. Many, as Grotius (II. 2, sect. 13) and Vattel (II. sects. 123, 132–134), decide that there is a right in this case, but naturally have to reserve for the owner the decision whether he will be harmed or not by parting with his commodities.

"'4. No State can, without violation of right, exclude another from intercourse with a third State against the will of the latter.

"'6. No State can exclude the properly documented

subjects of another friendly State, or send them away after they have been once admitted, without definite reasons, which must be submitted to the foreign government concerned.' "

205. This last rule, which Principal Woolsey takes from Heffter without qualification, seems in part at least to be an attempt to transmute a claim of Comity into a Perfect Right. In most of the other cases it will be seen that Principal Woosley limits Heffter's rules, till they become claims based on the right of Necessity; which is a very different foundation from that which Heffter assigns to them. Rights of Necessity will be separately considered in another chapter.

Woolsey narrows down Heffter's rules to claims based on the right of Necessity.

206. Without agreeing with all Heffter's rules about giving reasons to foreign governments, we shall be safe in holding that it is a heinous wrong to withdraw suddenly privileges, such as we have been describing, and to practice spoliation, imprisonment, or ruinous expulsion upon those foreigners who have been exercising them, in all cases where long usage has nurtured a well-founded expectation on the part of the foreigners that such privileges would continue to be respected. In such cases there is an implied promise on the part of the recipient nation to continue to respect those privileges. And the breach of that promise would justify the State, whose subjects were thereby injured, in exacting reparation for such wrong by measures of retaliation such as have been described*. This ob-

Consequences of the breach without due notice of a promise, express or implied, to allow the continuance of such privileges.

* See *suprà*, p. 196, and note. It is quite possible for the outrages to person and property to be so gross as to amount to a *casus belli*.

servation does not apply to cases where the commorant foreigners are guilty of misconduct which requires instant repression.

207. It is to be remembered also that there is a judicial presumption in favour of the Comity of Nations being always observed*.

Diplomatic usages.

208. Claims also which are connected with diplomatic usages and courtesies, are matters of the Comity of Nations and not of Perfect Right. The same is the case as to the extradition of criminals. This last-mentioned matter (namely the right, real or alleged, of injured States to have criminals given up to them, who have sought asylum abroad) has sometimes been treated as a Perfect Right; but the better and the now prevalent opinion is, that it is a matter of Comity only. This, of course, means that it is matter of mere Comity where there is no express treaty between the State which reclaims and the State which has received the criminal. If there be such a Treaty, its provisions will give the rule and practice†.

Extradition of Criminals.

* See Greenleaf on Evidence, § 43.

† Sir William Molesworth, in his essay on Foreign Jurisdiction and the Extradition of Criminals, after citing the opinions of some jurists that it is a positive duty to deliver up fugitives, who are charged on reasonable grounds with atrocious crimes, proceeds to remark (p. 37) that "On the other hand, Puffendorf holds that a State is only bound by treaty-engagement, or by some special circumstance, to surrender a fugitive criminal. The majority of modern writers adopt a similar view, and make extradition a question of national comity, in the absence of express stipulation. According to the generally received doctrine, if a person commits a crime, of whatever character or magnitude it may be, in one State, and escapes into another State, the former State cannot

Rights of Ownership, Dominion, and Empire.

209. We now come to a State's Right of Ownership (that is, of "Dominium"), and to its Right of Empire over Territory—things which are not always coextensive.

Property. Vattel cited.

210. When a State, by means of its citizens, occupies a country, all things, says Vattel, "susceptible of being property are considered as belonging to the nation which occupies the country, and they constitute the total or mass of its possessions there. But the nation does not possess all in the same manner. Those things which are not divided among communities or municipal bodies politic, or individuals of the nation, are called *public property*. Some of these are reserved for the use of the State, and are the property of the Crown, or of the Commonwealth, while others remain common to all the citizens, who use them, each according to his wants, or according to the laws which regulate their use; and these things are called common things. There are others which belong to some body or community; they are called property of a community, *res universitatis*, and they are for the particular body what public property is for the whole nation. As the nation may be looked upon as a great community, the property belonging to it so that all the citizens may use it, and that possessed by bodies or communities, may be called *common property*; the same rules

demand his extradition as a matter of right from the latter State. The refusal of such a demand might be an unreasonable or an unfriendly act; but it could scarcely be an act which would be held to justify menace, or reprisals, or war, in the case of powers of equal magnitude, or to justify coercion by a stronger over a weaker Power."

apply to both. And the things belonging to individuals are called *private property*, res singulorum"*.

211. It is to be remembered that the State has over all private property, and over all property of every kind within its boundaries, a Paramount Right† of Property, sometimes called *Dominium eminens*, sometimes called *Jus præeminens*."

Dominium eminens.

How a State may acquire property.

212. The modes in which a State can acquire Property according to International Law closely resemble those by which Individuals can acquire Property

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* Vattel, lib. 1. c. 20. § 235. Cited in Bowyer, 'Public Law,' p. 371.

† *Dominium eminens* is defined by Grotius in his 'De Jure Belli et Pacis,' lib. 1. cap. vi. sec. 2, thus:—"*Dominium eminens, quod civitas habet in cives et res civium ad usum publicum.*" Questions as to when and how the State may justly exercise this right over its own citizens within its territory, belong to the Constitutional Jurisprudence of the particular State, and not to International Law.

Sir R. Phillimore, vol. i. p. 166, makes these observations on *Dominium eminens*":—

"A State in the lawful possession of a territory has exclusive right of property therein; and no stranger can be entitled, without her permission, to enter within her boundaries, much less to interfere with her full exercise of all rights incident to that supreme dominion which has obtained from jurists the appellation of *Dominium eminens*.

"No individual proprietor can alienate his possessions from the State to which they belong, and confer the property of, or the sovereignty over them to another country.

"This general principle of *Dominium eminens* is applicable to all possessions, whether acquired (1) by recent acquisition through the medium of discovery and lawful occupation, (2) by lawful cession or alienation, (3) by conquest in time of war, duly ratified by treaty, or (4) by prescription."

The State right of *Dominium eminens* extends also to the property of strangers within the State. See Field, 'International Code,' p. 21.

according to the Roman Law, Title by Descent being, of course, excepted as inapplicable to the case of a State. Indeed, as Sir Henry Maine has remarked in a passage already quoted, Grotius and the Jurists of his school almost copied their rules as to a State's Rights of Property out of the 'Institutes' and the 'Digest.' But it is to be observed that there is in International Law a mode of acquiring territory, to which there is nothing precisely* analogous in Municipal Law—that is, "Acquisition by Conquest," which will be alluded to in the present chapter, but more fully discussed when we come to consider the subject of Rights consequent upon a condition of warfare.

State's Right to acquire by Conquest.

213. On the other hand, it is at least very questionable whether States can acquire territories by Testamentary disposition, or by Succession *ab intestato*. In former ages, when Kingdoms were regarded by many as the patrimonial properties of their princes, it was not uncommon for Kings and other sovereign personages to assume the right of bequeathing their

Semble. A State cannot acquire by Bequest or by Succession.

* "Conquest" (*Jus victoriæ*) is mentioned by the old writers as one of the modes by which territory may be acquired or lost. Grotius discusses the subject fully in the sixth chapter of his third book. It is unnecessary to refer here to more authorities, as the nature and amount of this right must be carefully examined in another place. M. Calvo (vol. i. p. 289) treats the right of acquisition by Conquest as peculiar to States. I have said that there is nothing in Municipal Law *precisely* analogous to it. I qualify the phrase thus, because it seems to me that the effect of a judgment and execution *in invitum* in Municipal Law, by which a piece of land is taken from one litigant and given to the other, is in many respects analogous to the conquest of territory by one Belligerent State from another.

dominions to whom they pleased; and such bequests often took effect with little or no gainsaying, especially in cases where there were no direct descendants of the bequeathing Prince or of his near ancestors*. But the decided tendency of modern International Jurisprudence is to hold that no country, at least no European country, is the patrimonial property of its Prince, so as to pass by the exercise of any bequeathing power in him†.

* Instances are cited by Halleck, p. 129. Many more might be added.

† Mr. Dudley Field, in his 'Draft Outlines of an International Code' (p. 17, paragraph 37), classifies the international modes of acquiring and losing territory as follows:—

"A nation may lose territory—

1. By abandonment;
2. By destruction;
3. By transfer; or
4. By conquest.

"A nation may acquire territory—

1. By occupation;
2. By accession;
3. By transfer; or
4. By conquest.

"No provision is made for devise or succession after death, inasmuch as the Devise of a Crown cannot be deemed to destroy the identity of the State; and the power of the monarch to alienate any part of the national territory by will should not be admitted."

See also Phillimore (vol. i. p. 284), commenting upon Grotius (lib. 2. c. vi.), and Vattel (lib. 1. c. xxi. and Preface). Much of what will be found in Phillimore and Vattel appears to deny that any Prince can in any way alienate, even by transfer, *inter vivos*, any part of the national territory. The sanction of the nation to the transfer is said (and in one sense is correctly said) to be necessary. But where a nation lives regularly under the rule of a single absolute ruler, that single absolute ruler is, to all intents and purposes, the nation's executive organ, and its representative in all dealings with foreign powers. The sanction of the nation must be taken to have been given beforehand to its absolute ruler's actions. It is, however, a widely different matter to hold that the absolute Prince has a right to make testamentary dispositions of the nation's territory or other property, which disposi-

A Prince may, in his personal capacity, acquire by Descent.

214. When it is said that a State cannot acquire property by Descent, it is, of course, not meant to ignore the numerous cases where the Prince of one country has claimed the crown of another country as his inheritance. But in such cases it is the individual Prince, and not the State that claims the new crown; and his acquisition of it (if obtained) does not blend one country with the other. The case becomes one of *personal* union, in which (as was explained in a previous chapter*) the two States are under the same person as their Political chief, yet each of them continues to be a distinct Political Society or State.

The generally recognized modes of acquisition.

215. The generally recognized modes by which a State may acquire domain are :—

1st. Occupation, which may involve title by Accession, or by Prescription;

2ndly. By Treaty and Convention;

3rdly. By Conquest.

Acquisition by Occupancy.

216. The acquisition of title to lands by Occupancy applies in strictness to the taking possession of uninhabited or deserted places only. In such cases Occupancy gives the best of titles. Grotius says of this, "Occupancy, or the taking possession of that which previously belonged to no one, is the only natural and original mode of acquisition; that is to say, it is the only mode of acquiring by the natural law without

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tions would come be operative after his death. Such a testamentary disposition could not possibly take effect as an act of the Prince in his capacity of executive organ and Representative of the State. When the time comes for its taking effect the Prince who made it is dead and gone. In leaving life he has abdicated Royalty.

* See p. 136, *supra*.

deriving a title from any other person." Yet neither England nor any other European State could make out a good title by "occupancy" to much transmarine dominion, if this definition were to be rigidly applied.

European Occupants and Native Pre-occupants.

The cases in which the territories beyond Europe, now held by Europeans, were quite "desert and uninhabited" when first visited by Europeans, are rare and exceptional. In the vast majority of instances the European "occupants" found native tribes already existing in the countries which were new to Europeans, but not new to human beings. It might have been, and may be fairly thought, that in cases where large territories were merely roved over by a few sparse savages, such countries ought not to be considered as already "occupied," and that the European new-comers gained a new title by occupancy. But in many cases the natives were in considerable numbers: they were often more or less agricultural; in some cases they had attained a high degree of peculiar civilization. But the interpretation of the Law of Nations, as between European new-comers and old natives, was always pronounced by the European—that is, by the stronger party; and the stronger party naturally interpreted according to its own interest. In the fifteenth and sixteenth centuries statesmen and churchmen in European Christendom held doctrines which got rid of all difficulties in such matters. Heathens were considered to be beyond the pale of the Law of Nations. The Pope, according to some mysterious but certainly widely prevalent mediæval theory, claimed paramount dominion over all islands,

Territorial Rights of Heathens ignored by Europeans in the 15th and 16th centuries.

and over all territories discovered beyond remote seas. The well-known Bull of Pope Alexander VI., in 1493, granted to the united monarchy of Castille and Arragon dominion over all lands discovered, or thenceforth to be discovered, westward of an ideal line, traced from pole to pole, so as to pass a hundred leagues westward of the Azores Islands. The rulers of other States did not altogether acquiesce in the titles thus given to the favoured nations of Castille and Arragon; and after the Reformation the English and the Dutch mariners scoffed, and did more than scoff, at the Pope's pretensions and at the rights of his grantees. Even at an earlier time our Henry VII. authorized Cabot to sail under the banner of England towards the east, north, or west, and to take possession, in the name of King Henry, of all countries discovered by him, which were not occupied by the subjects of any Christian Sovereign. Cabot had express power given him to trade with the inhabitants; which shows that much more than the occupation of desert countries was designed.

Queen Elizabeth's Charter to Sir Humphrey Gilbert.

217. The charter granted in 1579 by Queen Elizabeth to Sir Humphrey Gilbert (the founder of our North-American Empire) authorized him to occupy and to colonize any parts of the North-American continent that were not already in the possession of any of the Queen's allies. The Queen of England granted to her subject to take as his own "all such heathen and barbarous countries as he might discover;" but he and his successors were to do homage to the Queen and her successors, and the "rights of Englishmen" were promised to settlers in the new colonies.

Not to accumulate instances, the vast expanse of territory known in modern times as Prince Rupert's Land, or the Hudson's-Bay Company's Territory, extending from Labrador to the Pacific, and from the frozen regions of the Arctic circle to the French and Spanish settlements then existing in Canada, Louisiana, and Mexico, was granted in 1670 by King Charles II. to the Hudson's-Bay Company, with Prince Rupert at their head. An exception was made as to lands already possessed by other British subjects, or the subjects of any other Christian Prince or State; but the native tribes and nations were no more regarded as to proprietary rights than were the herds of elks and the families of black beavers.

In some instances territory purchased from the natives.

218. In some instances (notably in New England) the colonists honourably purchased from the chiefs of the native tribes the strips of territory on which they first settled. The foundation of Pennsylvania has always been justly considered memorable by reason of the equity with which Penn bargained with the natives for the domains of his colony, and also by reason of the good faith with which his treaties with them were observed*. But frequently the system of purchase was grossly fraudulent on the part of the civilized new comers, who knowingly bought large regions from chiefs or others who had no right to alienate them, and who interpreted the boundaries of their acquisitions according to their own convenience and rapacity. Sometimes there was not even any pretence to the formality of acquisition by purchase or voluntary

* Vattel, lib. 1. c. xviii. sect. 210.

grant. The new comer took by the strong hand, and disdained the hypocrisy of setting up any other title.

Mode by which Indian territories were originally taken is generally indefensible.

219. Altogether the processes, by which civilized Christians have supplanted heathen savages in many of the fairest parts of the globe, reflect little credit on our creed or our culture. In a judgment of the Supreme Court of the United States will be found an able apology, not for the mode in which the Indians lost their property, but for the policy, which the modern Anglo-Americans now pursue towards them as to retaining that property*. Chief Justice Marshall says, "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

American Jurists' justification of retaining those territories.

"The Title by Conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation, and become subjects and citizens of the government with which they are connected. The new and the old members of the society mingle with each other; the distinction between them is gradually lost, and they make one People. Where this incorporation is practicable,

* Johnson *v.* Mackintosh, 8 Wheaton, 589, cited by Twiss, p. 186.

humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

"When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame and hazard to his power.

"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

"What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct Society; or of remaining in their neighbourhood, and exposing themselves and

their families to the perpetual hazard of being massacred.

"Frequent and bloody wars, in which the Whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the Sovereign Power, and taken possession of by persons who claimed immediately from the Crown, or mediately, through its grantees or deputies.

"That law, which regulates and ought to regulate in general the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance and afterwards sustained, if a country has been acquired and held under it, if the property of the great mass of the community originates in it, it becomes the Law of the Land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be con-

sidered merely as occupants, to be protected indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to Natural Right and to the usages of Civilized Nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two peoples, it may perhaps be supported by Reason, and certainly cannot be rejected by Courts of Justice."

Conduct of Europeans generally towards Natives.

220. It does not become any European Power, it does not lie in the mouth of a Frenchman, or a Spaniard, or a Portuguese, a Hollander, or a Dane, and certainly not of a Briton, to be censorious towards the United States in this matter. In the first place, the primary wrongs against the Red Indians were inflicted by men who were then subjects of our own Empire; and there is much in the history of our settlements at the Cape, in Australia, in New Zealand, and elsewhere, which it is impossible to read without disapproval and shame.

Better spirit now shown by the British Government.

A better spirit is now shown (so far at least as regards the Imperial Government and the Colonial Governments) in our treatment of the natives in our colonies. This is especially the case in New Zealand; and we may hope (though with but faint expectations) for success to the efforts which for the last few years have been so honestly and wisely made by Governor Bowen and others to conciliate, to preserve, and to amalgamate with the English race the yet surviving remnant of the brave, the intelligent, and the once numerous Maori nation.

221. International Law has busied itself far less with the rights of the *Barbari*, of the natives of lands discovered from time to time by Europeans, than with the disputes among European States themselves, as to their titles by discovery and occupancy, and their titles by occupancy of lands left derelict by their first civilized discoverers. Many questions have also arisen as to the extent of the title acquired by settlers on the coasts, or along the lower courses of great rivers.

Disputes among rival European claimants by occupancy.

222. "Discovery, according to the acknowledged practice of nations, furnishes an INCHOATE title to possession in the discoverer. But for this to inure for the benefit of a State, the discoverer must be acting by public authority and commission of that State; or else the State must speedily ratify and adopt his discovery. A mere casual visit to a coast by uncommissioned merchant ships can give the State, to which such merchant ship belongs, no priority of title to the region*.

Effect of mere Discovery.

Inchoate Title, how acquired.

223. Supposing an *inchoate* title to be gained by a State in consequence of a discovery either made by its order, or made in its name or by one of its subjects and promptly ratified by it, such title is *inchoate* only, and will come to nothing, if it is not in reasonable time followed up by occupancy of the newly discovered region.

Inchoate Title, how completed.

224. Thus Vattel writes† :—"The Law of Nations will not acknowledge the Property and Sovereignty of a Nation over any uninhabited countries except those of which it has really taken possession,

* See 1 Phillimore, p. 243.

† Lib. 1. sect. 208, cited by Dr. Travers Twiss, p. 163.

in which it has formed settlements, or of which it has actual use. In effect, when Navigators have landed in desert countries, in which those of other nations had in their transient visits erected some monuments to show their having taken some possession of them, they have paid as little regard to that empty ceremony, as to the regulation of the Popes, who divided a great part of the world between the Crowns of Spain and Portugal.

A discovered country may become derelict.

225. When the Discoverers of a new country take no measures to perfect their title by use and occupation, the country becomes derelict; and the members of another State may occupy it, and may acquire lawful possession and property. For example, the Dutch in the seventeenth century discovered and gave names to New Zealand, to Tasmania or Van Diemen's Land, and to the eastern coasts of what we now call Australia. The Dutch called that territory New Holland. The names, which the Dutch navigators gave to those countries, indicated an intention to claim them on behalf of Holland; but when Holland had allowed long years to pass away without forming settlements or making any effective occupation of them, the English, who did occupy them and form settlements in them in the latter part of the eighteenth and the first half of the nineteenth centuries, acquired a perfectly good title to those countries by primitive acquisition as original occupants.

Example of New Holland.

Questions as to the amount of dominion gained by occupation of parts.

226. Questions as to the extent of territory which is gained by the occupation of a part, have often arisen, and have proved sometimes hard of solution. When the new country is an island or a peninsula of

small or even of moderate dimensions, there is not much difficulty in understanding that legal possession of the whole may be considered to have been taken, if there has been occupation of a few important points round its coasts, coupled with an assertion of dominion over the whole, and with an actual advance of settlers towards the interior, so far as their wants required and so far as circumstances permitted.

But it is different when we come to partial occupation of the coasts of the mainland. It would be monstrous to consider that the first settlers on a small seaward strip of a huge portion of the earth, such as the American continents, could exclude all the rest of mankind from possession of the bulk of such vast territories. Three rules on this subject were propounded and maintained by the Commissioners of the United States in the negotiations conducted by them in 1817 with the Commissioners of Spain, on the subject of the Western boundary of Louisiana. These rules are quoted with approbation by Sir R. Phillimore and Dr. Travers Twiss, and appear to be generally accepted. They are as follows:—

Rules generally adopted on the subject.

227. "The principles which are applicable to the case are such as are dictated by reason, and have been adopted in practice by European Powers in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and at the same time founded in strict justice. The first of these is, that when any European Nation takes possession of any extent of sea-coast, that possession is understood as extending into the interior

" country, to the sources of the rivers emptying themselves within that coast, to all their branches, and the country they cover, and to give it a right in exclusion of all other nations to the same. (See 'Mémoire de l'Amérique,' p. 116.) It is evident that some rule or principle must govern the rights of European Powers in regard to each other in all such cases; and it is certain that none can be adopted, in those to which it applies, more reasonable or just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a range of territory so described for the same society, to have connected its several parts together by the ties of a common interest, and to have detached them from others. If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition; but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of an European Power which discovered and took possession of a new country to the spot on which its troops or settlements rested—a doctrine which has been totally disclaimed by all the Powers who made discoveries and acquired possessions in America. The other extreme would be equally improper—that is, that the nation which made such discovery should, in all cases, be entitled to the whole of the territory so discovered. In the case of an island, whose extent was seen, which might be soon sailed round and preserved by a few forts, it may apply with justice; but in that of a continent it would be abso-

lutely absurd. Accordingly we find that this opposite extreme has been equally disclaimed and disavowed by the doctrine and practice of European nations. The great continent of America, North and South, was never claimed or held by any one European nation, nor was either great section of it. Their pretensions have been always bounded by more moderate and rational principles. The one laid down has obtained general assent.

"The second is, that whenever one European nation makes a discovery and takes possession of any portion of that continent, and another afterwards does the same at some distance from it, where the boundary between them is not determined by the principle above-mentioned, the middle distance becomes such of course. The justice and propriety of this rule is too obvious to require illustration.

"A third rule is, that whenever any European nation has thus acquired a right to any portion of territory on that continent, that right can never be diminished or effected by any other Power, by virtue of purchases made, by grants or conquests of the natives within the limits thereof. It is believed that this principle has been admitted and acted on invariably since the discovery of America, in respect to their possessions there, by all the European Powers."

Certain questions affecting Boundary Rules, and rights of dominion, to be considered here.

228. Before going into the subject of the acquisition of territory by Accession, it will be convenient to introduce the remarks which must be made in some part of this treatise as to questions of boundary, and some connected questions as to rights of dominion

which not unfrequently arise when there are seas or rivers at or near to any of the extremities of a State's territory, and also in some cases when inland seas and rivers penetrate such territory and extend to the territories of other States beyond it.

Navigable Rivers.

229. First as to Navigable Rivers.

There is no jural difficulty when a navigable river flows for its entire length through the territory of one and the same State. It is then regarded and commonly spoken of as forming a part of the dominion and possessions of such State, including the bays and estuaries formed by such river's junction with the sea*. When, indeed, we remember that, according to the Roman Jurists, certain things, among which running water is included, are regarded as by nature incapable of being appropriated†, we think it more correct to say, with Dr. Travers Twiss‡, that "the river of which both banks are in the possession of one and the same Nation, may be regarded as a stream of water contained in a certain channel, which channel forms part of the territory of the Nation. Such water accordingly, whilst passing through the territory of that Nation, is subject, like all other things within its territory, to the Empire of the Nation; and those who navigate upon it are subject to the Jurisdiction of the Nation *ratione loci*." He adds that "A nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may righfully exclude at

* Halleck, p. 137.
† Institute, lib. 2. tit. 1.
‡ P. ~~137~~ 232.

its pleasure every other Nation from the use of the stream whilst it is passing through its territory; and this rule of Positive Law holds good whatever may be the breadth of a river. Moreover the fact that other Nations have freely navigated the stream before both banks of the river have come into possession of one and the same Nation will not control the operation of this rule."

Rule when a navigable River is a boundary.

230. "Where a navigable river forms the boundary of conterminous States, the middle of the [navigable] channel, the *Thalweg*, is generally taken as the line of their separation, the presumption of law being that the right of navigation is common to them both*. But this presumption may be rebutted by actual proof of the exclusive title of one of the riparian proprietors to the entire river"†. For, "a nation which has established itself on one of the banks of a river prior to the occupation of the opposite bank by any other nation, may, with a view to its own security, reduce the channel of the river into possession without occupying the other bank. It may for this purpose either station an armed fleet upon its waters, and thereby occupy the fairway of the river, or it may erect armed forts upon its own bank and thereby command the fairway; and in either case it will be able effectively to exclude other nations from the use of the river." That a nation which is settled on one only of the banks of a river may nevertheless have a right of Empire over the entire river, is noticed by Grotius‡. But though, as I have said in case of any

* Halleck, p. 138.

† Travers Twiss, p. 201.

‡ The original passage in Grotius is, "Quanquam res in

"doubt, the jurisdictions on each side reach to the middle of the river that runs between them, yet it may be, and in some places it has actually happened, that the river belongs wholly to one party, either because the other nation had not yet possession of the other bank till later, when their neighbours were already in possession of the whole river, or else because matters were so stipulated by some treaty." The sanction, which Usucapion, or established possession, in such a case gives to the claim of a nation to exclude other nations from the use of a river, has not been overlooked by Vattel:—"A long and undisputed possession establishes the right of a nation, otherwise there could be no peace, no stability between them; and notorious facts must be admitted to prove possession. Thus, when from time immemorial a nation has without contradiction exercised the sovereignty upon a river which forms its boundary, nobody can dispute with that nation the supreme dominion over it"*.

The *Thalweg* and the *Medium Filum.*

231. It has been stated that where a navigable river separates neighbouring States, the *Thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquæ*, was regarded as the boundary line; and it still will be regarded *primâ facie* as the

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dubio, ut diximus, imperia ad medietatem fluminis utrinque pertingunt, fieri tamen potuit, et contigisse alicubi videmus, ut flumen totum parti uni accederet, quia scilicet ripæ alterius imperium serius occupato jam flumine cœpisset; aut quia eum in modum pactionibus esset definita."—Lib. 2. c. iii. sect. 18.

* Travers Twiss, p. 202.

boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation. Dr. Travers Twiss * on this subject quotes and agrees with Kluber:—"Pour ce qui est des fleuves et lacs frontières, dont la rive opposée est également occupée, leur milieu, y compris les îles que traverse la ligne du milieu, sépare ordinairement les territoires. Au lieu de cette ligne on a nouvellement choisi pour frontière le '*Thalweg*,' c'est-à-dire le chemin variable que prennent les bateliers quand ils sont aval, ou plutôt le milieu de ce chemin." He goes on to observe that "Grotius and Vattel speak of *the middle of the river* as the line of demarcation between two jurisdictions, but that modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable *mid channel*. If there be more than one channel of a river, the deepest channel is regarded as the navigable mid channel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression of its bed. The islands on either side of the mid channel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the mid channel of the river will not operate to deprive

* P. 206, citing Kluber, 'Droit des Gens,' sect. 133.

the nation of its possession, although the water-frontier line will follow the change of the mid channel."

Common cause of dispute when river flows through other territories.

232. The chief disputes connected with rivers have arisen in cases where a navigable river, during part of its course, flows through the territory of a State, or forms its boundary, that river having passed or passing through the territory of some other State before it reaches the sea.

Common form of the dispute.

In such cases it is usually found that the last-mentioned State, through whose territory the river flows after quitting the territories of other States, claims, as a matter of strict right, absolute territorial jurisdiction over so much of the river as is within its territories, and assumes the lawful power to exclude from that portion of the river the subjects and the vessels of all other States, not excepting those States whose territories abut on higher portions of the river, and who, by the strict exercise of such right, are prevented from using the river as a means for communication between their territories and the open sea*. On the other side, it is alleged that all the nations inhabiting the different parts of the river's banks (often called by the general name of the "Riparian Proprietors") have a right of navigation for commercial purposes down at least to the sea. The writers who set up this claim do not always use very distinct language respecting it. They sometimes concede that this right of "Innocent Passage" is an *imperfect right*; and if it is allowed to be an

* See Halleck, 141; Travers Twiss, 197.

Imperfect Right only, there is little essential difference between them and their antagonists. For the strenuous maintainers of full territorial strict right in the nation through whose territories the river flows for a space, appear to be willing to concede that, by the Comity of Nations in favour of commerce and of free friendly intercourse between all members of the commonwealth of States, such innocent right of passage should be permitted, but as a matter of favour only.

The apparently soundest conclusion.

233. The soundest conclusion seems to be that the right of innocent passage is an imperfect right, based on the Comity of Nations only, and that consequently the State, through whose territories the river flows for a space, may, as a matter *Stricti Juris*, exclude foreigners and their vessels from that portion of the river altogether *. But such exclusion, unless in fair retaliation for wrong, or for other grave cause, would be a gross breach of the Comity of Nations, and highly discreditable to the nation which enforced it. The result would be similar if needlessly vexatious restrictions and regulations were imposed as to the passage through the State which grants the right out of Comity. But that State is clearly entitled to make such fair

Roman Law. Rivers are not like the sea, *Res Communes*, but *Res Publicæ*.

* Observe the principles of the Roman Law, which makes an important distinction between the Sea and Rivers as regards rights of Property. The Sea is "Communis omnium naturali jure;" but Rivers are "Publicæ res, quarum proprietas est populi vel reipublicæ, usus vero omnium ex populo." (Warnkœnig, sects. 270 and 271; Phillimore, vol i. 167; Institutes, lib. 2. tit. 1. sec. 1–5; Digest, lib. 1. tit. 8. sec. 5.)

rules about its exercise as its own safety and convenience require*.

Perfect Right of Passage sometimes claimed by the Riparians.

234. Some, however, of the Advocates of the claims of the Riparian Proprietors appear at times to assume a more peremptory tone, and to claim this "innocent passage as a real subsisting right, founded upon the law of nature, recognized by the general consent of nations, and which must now be regarded as an established principle of international law." They appear to deny even the strict right of the State, through whose territorial waters the "innocent passage" is sought, to deny such passage altogether, or to impose unreasonable restrictions on its exercise†.

235. With regard to most of the great rivers of the civilized regions of the world, these rights of navigation and user are regulated by express treaties.

Recurrence of questions as to Riverain Rights.

But this is not always the case, and many of these treaties are for limited periods only; so that it is necessary to study the riverain rights of nations according to the common law of International Jurisprudence.

The Ocean no subject-matter of Property.

236. The Ocean, or open Sea, is regarded in International Law very differently from Rivers. The Jurists of old Rome marked the distinction; and in the 'Institutes' the Sea is spoken of as one of those things which are "Naturali Jure communia omnium"‡.

* See the observations of Sir R. Phillimore, vol. i. p. 182, as to the disputes between the United States and Great Britain respecting the navigation of the St. Lawrence; and see as to same subject, Wheaton, 'Histoire du Droit des Gens,' t. ii. p. 195–199.

† Halleck, 141.

‡ Lib. 2. tit. 1. sec. 1 & 2; see note at p. 225, *suprà*.

But when Rivers are spoken of, they are defined not as things "Common," but as things "Public." "Flumina autem omnia et portus Publica sunt." There is an important distinction between *Communia* and *Publica*. Things "public" (according to the proper sense of the word *Publicus* in Roman Law) belong to a particular people—to the State. Things common belong to nobody: the use of them is free to all mankind. Many attempts have been made in mediæval and modern times by particular States to arrogate as their own, and to appropriate large portions of the open sea*. But all such claims (except under the very special circumstances hereafter to be noticed) are now regarded as essentially void. Sir R. Phillimore remarks on this subject that "Puffendorf, in the 5th chapter of his 4th book, *De Jure Naturali Gentium*, and the essay of Bynkershoek, *De Dominio Maris*, have exhausted this theme. It is sufficient to say that the reason of the thing, the preponderance of authority, and the practice of nations have decided that the *main ocean*, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one State"†. I will

Frequent attempts to arrogate State Dominion over portions of the Ocean.

* The pretensions of the Spaniards and Portuguese to exclude all other nations from navigating the Indian Seas and the South Pacific are among the most memorable. Sir R. Phillimore quotes (vol. i. p. 187) from Camden, an able answer of Queen Elizabeth to the Spanish ambassador. She said "that the English navigated on the ocean, the use of which was like that of the air, common to all men, and which, by the very nature of it, could not fall within the possession or property of any one."

† Vol. i. p. 186.

quote further the words of only two more authorities on the subject, of Chancellor Kent and of Dr. Travers Twiss.

Chancellor Kent says* :—"The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind; and the Public Jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there in time of peace on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects in its own public and private vessels; and so far territorial jurisdiction may be considered and preserved; for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the State committed on board of its public and private vessels at sea, and on board of its public vessels in foreign ports. This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round herself a line of territorial jurisdiction, within which no other is to be at liberty to intrude. Every vessel in time of peace has a right to consult its own safety and convenience, and to pursue its own course and business without being disturbed, when it does not violate the rights of others."

* Vol. i. p. 29.

Dr. Travers Twiss, in his recent 'Law of Nations,' has discussed this matter very fully and clearly*. He says :—"The Ocean, or open Sea, is by Nature not capable of being reduced into the Possession of a Nation, since no permanent settlement can be formed upon its ever changing surface; neither is it capable of being brought under the Empire of a Nation, as no armed fleet can effectively occupy it in its full extent, so as to preclude other nations altogether from the use of it. Nature herself has in these respects set limits to human enterprise and human ambition. But, independently of these insurmountable difficulties, the use of the open Sea, which consists in navigation, is innocent and inexhaustible. He who navigates upon it does no harm to any one; and the Sea is in this respect common to all mankind."

As to exercise of State Jurisdiction at Sea.

237. The open sea is therefore *Nullius territorium*. No Nation can claim to exercise jurisdiction over its waters on any ground of exclusive Possession. On the other hand, it is the public highway of Nations, upon which the vessels of all Nations meet on terms of equality, each vessel carrying with it the laws of its own Nation for the government of those on board of it in their mutual relations with one another, but all subject to a Common Law of Nations in matters of mutual relation between the vessels themselves and their crews. The origin of this Common Law of the Sea is lost in the darkness

Common Law of Nations as to the Sea.

* P. 241.

of a very remote antiquity; but it sprang into existence with the earliest necessities of maritime commerce. We find the rudiments of such a law amongst the Athenians; and the Rhodian Laws of the Sea, of which a very few fragments have been preserved in the 'Digest,' are supposed to have been a collection of Maritime Customs observed amongst Nations established on the shores of the Mediterranean, and which formed at such time their Common Law on Maritime matters. Rules of Law, which prevailed amongst those nations, are still recognized by the Maritime tribunals of existing European nations as rules for the decision of analogous questions.

It would appear that the Romans under the Empire, with their usual wisdom, recognized the Customs of the Sea as furnishing the rule of decision in Maritime questions, where such Customs were not contrary to any positive Law of the Empire. Thus, when Eudæmon of Nicomedia appealed to the Emperor Antonine against the rapacity of the Publicans in the Islands of the Cyclades, on the occasion of his having suffered shipwreck, the Emperor is represented to have replied, "Ego quidem mundi dominus, Lex autem maris. Lege id Rhodiâ, quæ de rebus nauticis præscripta est, judicetur, quatenus nulli nostrarum legum adversatur. Hoc idem Divus Augustus judicavit." (Dig. lib. xiv. tit. 2. sec. 9*.)

This consuetudinary Law of the sea, which was thus recognized and adopted by the Emperors in the palmy period of Roman Jurisprudence, is believed

* Travers Twiss, 244.

"to have come down to us in various collections of sea-customs, *e.g.* the Rooles or judgments of Oleron, the Consolate del Mare, and the Maritime Law (Waterrecht) of Wisby. These customs of the sea have been received by all nations [of European Christendom and their American offshoots]; and all [these] nations exercise a concurrent jurisdiction to enforce them; and for this purpose there are special tribunals established in every [such country] known as Courts of Admiralty Jurisdiction."

Courts of Admiralty Courts of the Law of Nations.

238. Without pausing here to investigate the origin of the word "Admiral," or the archæology of Admiralty judicature, it may be stated generally that Courts of Admiralty have authority *jure gentium* over questions of salvage, of collision, of piratical taking of goods or injury to persons, and over maritime contracts, where the alleged cause of action occurred on the high seas, or in ports and havens within the ebb and flow of the tide. The municipal laws of many States regulate and modify, control or increase, the proceedings and powers of their Admiralty Courts; but the jurisdiction above mentioned appears to attach to them by the old consuetudinary law of the Sea. It is to be remembered that this is a general jurisdiction, distinct from the jurisdiction which such Courts exercise over Prizes when their nation is at war*.

Dr. Travers Twiss in another place remarks that

* See De Looi's *v.* Boit, 2 Gallison's Reports, 398 (Curtis's Digest, p. 7); The 'Hercules,' 2 Dodson, Rep. 369; Tr. Twiss, 246; 1 Kent, 407–419; Abbot on Shipping, *passim*.

"the High Seas are said in a certain sense to be *nullius territorium*, as not being subject to the exclusive possession or empire of any Nation. In another sense they may be called the 'common Highway' of nations [the Ὑγρὰ κέλευθα]; and perhaps this is the more correct expression, seeing that all who navigate them are subject to a Common Law of nations, and in matters within the scope of that Law are amenable to the maritime tribunals of all nations.

Maintenance of Peace of the Sea.

239. "The maintenance of the peace of the Sea is one of the objects of that Common Law; and all offences against the peace of the Sea are offences against the Law of Nations, and of which all nations may take cognizance.

Pirates justiciable everywhere.

"The Pirate has no national character; and to whatever country he may have originally belonged, he is *justiciable* everywhere, being reputed out of the protection of all laws and privileges whatever."

Rights as to land-locked portions of the Sea.

240. Such is the law of Nations as to the Ocean, the *mare vastum*, the open sea. But those portions of the sea, which are land-locked, and almost enclosed within the territories of a State, which are *intra fauces terræ*, as the phrase is, are clearly within the exclusive territorial jurisdiction of the State whose lands gird them round. In the case also of bays, or portions of sea not so completely enclosed, but which lie within a clear and well-defined concave curve, the base of which is a line drawn from one promontory, or other excrescence of the land, to another, the State, whose territories thus clasp these oceanic waters, claims and exercises exclusive jurisdiction over them.

Bays and Gulfs.

Such bays are called by British writers "The King's Chambers." According to some writers there is a limitation of distance as to the width of the bays over which such exclusive jurisdiction may be claimed. It ought not in their judgment to be allowed if the distance from horn to horn of the bay is more than twice the range of cannon-shot*. But the present tendency of writers on the subject is to extend the privilege to much ampler bays. Chancellor Kent tells us that the United States "have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and our welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauch Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi."

King's Chambers.

Limitation as to width.

241. In the case of every nation whose territory abuts on the sea, such nation has a right to preclude Belligerent Powers from carrying on hostilities upon the open sea within a certain distance of its coast. That distance is judged of with reference to the range of artillery. In other words, a nation's right to compel others to keep the peace in the open sea near its coasts extends over so much of the sea as the nation could command by artillery placed on its coast. This extent has hitherto been fixed by general

Rights of State as to open Sea adjacent to its Coast.

* 1 Phillimore, 212.

consent at a maritime league, or three miles seaward; but from the great improvements which have recently been made in the range of cannon, it is probable that a line of five miles will hereafter be adopted as the measure. But the right of the State to exclusive jurisdiction over the adjacent sea within the range of cannon-shot applies only to purposes of defence, to the protection of the State's fisheries, revenues, and to secure its maintenance of neutrality. It does not make the sea within the specified limit a part of the State's property, although the vague expressions of some Publicists might seem to imply as much. There are several judgments of the English tribunals which are express on the subject. One is in the case of the King *v.* 49 Casks of Brandy, reported in 3 Haggard, p. 259. Sir John Nicholl, the Judge of the Admiralty Court, in giving judgment on that case, used these words:—"As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles; but that rests upon different principles—namely, that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during war; and they would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the shore than three miles; but no person ever heard of a land jurisdiction of the body of a county, which extended to three miles from the coast." This is corroborated by the judgment of the Lord Chancellor pronounced in Gann *v.* the Company of Free Fishers of Whit-

Nature of this Jurisdiction.

Decisions of the English Courts on the subject.

stable, decided in the House of Lords in 1865*. This matter also received adjudication in the case of the 'Saxonia,' reported in Lushington's 'Admiralty Reports,' vol. i. p. 140. In that case a foreign ship, that was navigating part of the sea between the Isle of Wight and Hampshire, less than three miles from the shore, was treated both by the Judge of the Admiralty Court and by the Lords of the Privy Council in Appeal as being on the high seas. In an earlier case, the 'Twee Gebroeders,' 3 Robinson, 352, Lord Stowell, in speaking of a part of the waters of the Western Eems, which part was assumed, for the purpose of argument, to be within three miles of the coast of East Friesland, said of it:—"Such waters are considered as the common thoroughfare of nations, though they may be so far territorial that any actual exercise of hostility is prohibited therein"†.

242. Sometimes, from the nature of the shore, it is not easy to fix the point whence the measurement of the fixed distance seaward shall be drawn. In such cases, Courts of International Law will be disposed to calculate the distance liberally. This involves a liberal construction as to the extent of territory strictly speaking. Thus, in the case of "The Anne La Porte," 5 Robinson, 373, it appeared that "there were a number of little mud islands composed

As to the land boundary whence the marine league is calculated.

* 35 L. J. 29.

† See also "The United States *v.* Furlong," 5 Wheaton, p. 134.

Some observations as to the more extensive rights which Maritime States claim and exercise over the seas adjacent to their dominions, in order to prevent smuggling and "hovering," will be found a few pages further on.

of earth and trees drifted down by the River Mississippi, and which formed a kind of portico to the mainland. The capture in question took place within three miles of these islands, but beyond that distance from the mainland. It was contended that such islands were not to be considered as any part of the territory of America—that they were a sort of 'No man's land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was also argued that the line of territory was to be taken only from Balize, a fort raised on made land by the former Spanish possessors." Lord Stowell, however, held that the protection of territory was to be reckoned from these islands. "They are," he observed, "the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in books of law. *Quod vis fluminis de tuo prædio detraxerit et vicino prædio attulerit, palam tuum remanet*" (Inst. lib. ii. tit. 1. sec. 21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible,

at least, that they might be so occupied by European nations; and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion; for the right of dominion does not depend upon the texture of the soil."

Jurisdictional waters. Meaning of the term.

243. The waters within this three-mile limit from the coast are called by Dr. Twiss a State's Jurisdictional waters; and the term is convenient as distinguishing them from the parts of the sea that are within its ports, havens, and land-locked gulfs, which may be quite correctly called its territorial waters.

Exclusive Rights of Fishery and taking of marine products.

But there are some important matters, such as the right to fish, and the right to take submarine productions, which require special notice. A material difference is practically acknowledged to exist between the general right to fish and take other marine products in the open sea, and the right to do so in Jurisdictional waters. Of course, in Territorial waters (as recently explained) the right belongs exclusively to the State that owns the territory. But the Practice of nations has sanctioned the exclusive right of every nation to the fisheries in the waters adjacent to its coasts within the limits of its Maritime Jurisdiction; and accordingly we find that a permission for the subjects of one nation to fish within the Jurisdictional waters of another nation is a frequent sub-

ject of Treaty-engagement. "The various uses of the sea," writes Vattel, "near the coasts render it very susceptible of property. It furnishes fish, pearls, shells, amber, &c. Now, in all these respects its use is not inexhaustible; wherefore the nation to which the coasts belong may appropriate to itself an advantage which Nature has so placed within its reach as to enable it conveniently to make itself master of it, and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl-fisheries of Bahrem and Ceylon may lawfully become property? And though, where the catching of swimming fish is the object, the fishery appears less liable to be exhausted; yet if a nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that natural benefit as an appendage to the country which it possesses, and to reserve to itself the great advantages which it may derive by commerce, in case there be a sufficient abundance of fish to enable it to furnish the neighbouring nations with a supply? But if, so far from making itself master of a fishery, a nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it: it has left that fishery to its primitive state of communion, at least with respect to those who have been accustomed to take advantage of it."

As to exclusive Rights of Fishery in

244. With respect to the right of Fishery in the open sea, it is unquestionably as a general, if not as

a universal rule, the right of all men. Yet it is held by the best Publicists that one nation may, as against another nation, acquire by express treaty the right to exclude the members of that other nation from fishing, and even from navigation, in specified parts of the open sea*. Indeed, according to Vattel, though the exclusive right of navigation or fishery in any part of the open sea cannot be claimed by any one nation on the ground of immemorial use, yet a claim to such exclusive right may be established, where the non-user by other nations assumes the nature of abstinence on account of tacit agreement, and where such abstinence has become a matter of long usage†. This claim of exclusive right as against all nations, on the ground of implied assent, is obviously very different from a claim to exclude the shipping of particular nations by reason of compact, or express assent. The claim of exclusive right as against all the world seems open to the strong objections which Wheaton urges against all claims to arrogate exclusive dominion over the open sea‡.

parts of the open Sea.

245. States may exercise a qualified jurisdiction over the seas near their coasts for more than the three (or five) miles limit for fiscal and defensive purposes; that is, for the purpose of enforcement of their revenue laws, and in order to prevent foreign armed vessels from "hovering on their coasts" in a

Ampler right of interference on the high sea for protection of Revenue and to prevent "Hovering."

* 1 Phillimore, 188; and see the passages there cited from Grotius and from the 'Digest.'

† Liv. 1. c. xxiii. sec. 286.

‡ Wheaton, 'Elém.' tome i. p. 178.

menacing and annoying manner. Both Great Britain and the United States have prohibited the transshipment within four leagues of their coasts of foreign goods without payment of duties*. The American Supreme Court has declared this regulation to be founded on International law†.

Claims and Right of exclusive jurisdiction over "Narrow Seas."

246. There are also certain "narrow seas" over which particular States claim jurisdiction, though portions of such seas (and the greater portions) may be more than three miles from the coasts of those nations, and though the opposite shore may belong to another nation. It is not often in such cases that a particular nation now insists on its right to the entire property in such narrow sea, though the language of some writers on the subject goes to this extent‡. But still the jurisdictional claims put forward are sometimes very ample. A claim of this kind is commonly called a claim of *Mare Clausum*; and the discussions as to *Mare Clausum* or *Mare Liberum* are memorable in the history of Jurisprudence. According to Martens, who wrote about a century ago, the following seas are acknowledged as free—"the Spanish Sea, the Aquitain Sea, the North Sea, the White Sea, the Mediterranean Sea, and the Straits of Gibraltar. The three Straits between Denmark and Sweden are under the dominion, and are looked on as the property of the King of Denmark; St. George's Channel, between Scotland and Ireland, is under the dominion of Great Britain; the Straits of Sicily are under the

* 1 Phillimore, p. 211.
† 1 Kent, 34.
‡ Martens, 161.

dominion of the King of Sicily; the Gulf of Bothnia is under the dominion of the King of Sweden; the Black Sea, the Ægean Sea, the Bosphorus of Thrace, the Propontis, and the Hellespont are all under the dominion of the Turkish Empire." The state of things is much the same at present, except probably with regard to the Ægean Sea, and except with regard to the Black Sea, which, by reason of its magnitude, seems to be incorrectly classed with the other seas which have been mentioned. The exclusive claims of the Sultan to rights over this sea appear to have depended on the fact that it is, or was, only accessible through straits of which the Sultan owned both coasts, and on the fact that for a long period the whole of the territories round the Euxine were Ottoman territories. This has ceased to be the case since the extensive conquests effected by the Russians to the north and west of its waters. The navigation of the Black Sea is now regulated by treaty.

International Law as to Fluvial Accessions.

247. International Jurisprudence adopts the principles and rules of the Roman Law as to property in lands which are formed or changed by the operation of watercourses and other aquatic agencies at or near to the boundaries of neighbouring territories. This is very fully and well explained by Sir George Bowyer (citing Grotius, Vattel, and other authorities) in a passage which I will quote from that learned writer's work on Public Law*.

* P. 366 *et seq.* See also the explanations of this subject in 1 Phillimore, 366; Calvo, vol. i. p. 349; Halleck, 138; Bluntschli, 179.

Opinion of Grotius.

248. "Grotius examines the question whether, when rivers change their course, they at the same time change the boundaries of States, and whether that which a river adds to its banks augments the territory of the State on the side on which the addition takes place. He divides lands, with reference to the nature of their boundaries, into three classes:—I. Lands specifically assigned by measurement and artificial boundaries, and metes and bounds, which Florentinus denominates *limited* (*agri limitati*). II. Those which are assigned in gross—that is to say, limited in extent, as to so many acres, but without specific boundaries and landmarks. III. Lands bounded by natural limits, and called *agri arcifinii*. Barbeyrac, in his notes on Grotius and Puffendorf, expresses an opinion that they did not correctly give the meaning of the ancient writers who furnished this classification; but he admits that the principle derived from the distinction between lands defined by artificial limits or measurements and the *agri arcifinii* is correct. With regard to the lands of the first two classes, the change of the course of a river does not alter the boundaries, and whatever is added by alluvion is vacant, and belongs, by the Law of Nations, to whoever occupies or takes possession of it, because the extent and limits of the land are fixed and determined.

"With regard to the third class of lands, i. e. *agri arcifinii*, a river, which bounds them, changes the boundaries of territory and jurisdiction by gradually altering its course; and whatever it adds on one side belongs to the territory on that side, because the two

States between which the river flows are presumed to have originally taken the centre of the river as their natural boundary. This is so where the change of the course of the river is gradual. For there the change of its parts does not destroy its identity, but leaves it the same. But it is otherwise when the change is sudden and entire; for in that case, if the people, into whose country the river has gone, do not consent to lose part of their land, for the purpose of retaining the natural limits of the water, the boundary is presumed to be in the middle of the bed which the river has left. If the river flow between two States, and belong entirely to one of them, the islands formed therein belong entirely to that State; but the better opinion is, that the alluvion on the other side appertains to the State on that side. If, on the other hand, the river belongs to neither State, the islands and alluvions formed there are vacant, and will belong to whoever occupies them. But the State nearest to a new island, and that to whose land an alluvial addition grows, must be presumed to take possession rather than the other State. And if the boundary be in the middle of the river, and an island be formed in the middle, it will belong to both States in equal shares; but if it be nearest to one bank, the greater part or the whole will belong to the State on that side. If a river divide into branches in one place, and those branches join in another, the land thus enclosed, which becomes a sort of island, remains the property of its former owner.

"It is not lawful to make on a river any works cal-

culated to alter the course of the water, and throw it on the opposite bank. But each party may protect his own property and prevent the current from carrying away his ground. In general, no works can be constructed on a river, or elsewhere, prejudicial to the rights of others. If a river belongs to a nation, and another have an undoubted right of navigating it, the former must not construct dykes or mills which would cause the river to be no longer navigable. Its right is in this case a limited ownership, so that such right can only be exercised without prejudice to the rights of others.

"Alluvion is thus defined in the Civil Law:—*Est alluvio incrementum latens, quo quid ita paulatim agro adjicitur ut intelligi nequeat quantum quoquo temporis momento accedat.* It is a mode of acquisition by natural law, called Accession, which is a species of occupancy. For occupancy is either simple or consequent. The former is where a man takes possession, as proprietor, of any thing which is the property of no one. It becomes his by right of occupancy; for, as Justinian says, *Quod ante nullius est id naturali ratione occupanti conceditur.* The latter occurs, 1st, where any one's property produces fruit, and, 2ndly, when any thing adheres to or accedes to and becomes part of the property of any one; for there the addition or increase is acquired by him as an accession to his property; and we have seen that alluvion is a means of acquiring territory to States as well as simple occupancy."

Vattel as to Lakes.

With regard to Lakes, Vattel gives us the following

principles of Public Law:—"What we have said of rivers and streams may easily be applied to lakes. Every lake entirely included in a country belongs to the nation which is the proprietor of that country; for, in taking possession of a territory, a nation is considered as having appropriated to itself every thing included in it; and as it seldom happens that the property of a lake of any considerable extent falls to the share of individuals, it remains common to the nation. If this lake is situated between two States, it is presumed to be divided between them at the middle while there is no title, no constant and manifest custom to determine otherwise.

"What has been said of the right of alluvion in speaking of rivers is also to be understood as applying to lakes. When a lake which bounds a State belongs entirely to it, every increase in the extent of that lake falls under the same predicament as the lake itself; but it is necessary that the increase should be insensible, as that of land in alluvion, and, moreover, that it be real, constant, and complete. If this increase be not insensible, if the lake, overflowing its banks, inundates a large tract of land, this new portion of lake, this tract thus covered with water, still belongs to its former owner. Upon what principles can we found the acquisition of it in behalf of the owner of the lake? The space is very easily identified though it has changed its nature; and it is too considerable to admit a presumption that the owner had no intention to preserve it to himself notwithstanding the changes that might happen to it.

"2. But if the lake insensibly undermines a part of the opposite territory, destroys it, and renders it impossible to be known, by fixing itself there and adding it to its bed, that part of the territory is lost to its former owner, it no longer exists, and the whole of the lake thus increased still belongs to the same State as before.

"3. If some of the lands bordering on the lake are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil which the lake invades by little and little belongs to the owner of the lake and is lost to its former proprietor, is because the proprietor has no other boundary than the lake, nor any other mark than its banks, to ascertain how far his possession extends. If the water advances insensibly, he loses; if it returns in like manner, he gains: such must have been the intention of the nations who have respectively appropriated to themselves the lake and the adjacent lands; it can scarcely be supposed that they had any other intention. But a territory overflowed for a time is not confounded with the rest of the lake; it can still be recognized, and the owner may still retain his right of property in it. Were it otherwise, a town overflowed by a lake would become subject to a different government during the inundation, and return to its former sovereign as soon as the waters were dried up.

"4. For the same reasons, if the water of the lake, penetrating by an opening into the neighbouring country, there form a bay or new lake, joined to the

first by a canal, this new body of water and the canal belong to the owner of the country in which they are formed. For the boundaries are easily ascertained, and we are not to presume an intention of relinquishing so considerable a tract of land in case of its being invaded by the waters of an adjoining lake.

"It must be observed that we here treat the question as arising between two States. It is to be decided by other principles when it relates to proprietors who are members of the same State. In the latter case it is not merely the bounds of the soil, but also its nature and use, that determine the possession of it. An individual who possesses a field on the borders of a lake cannot enjoy it as a field when it is overflowed; and a person who has, for instance, the right of fishing in the lake may exert his right in this new extent; if the waters retire, the field is restored to the use of its former owner. If the lake penetrates by an opening into the low lands in its neighbourhood and there forms a permanent inundation, this new lake belongs to the public.

"The same principles show that if the lake insensibly form an accession of lands on its banks, either by retiring or in any other manner, this increase of land belongs to the country which it joins, when that country has no other boundary than the lake. It is the same thing as alluvion on the banks of a river.

"But if the lake happened suddenly to be dried up, either totally or in a great part of it, the bed would remain in possession of the sovereign of the lake, the

nature of the soil so easily known sufficiently marking out the limits.

"The empire or jurisdiction over lakes and rivers is subject to the same rules as the property over them in all cases which we have examined. Each State naturally possesses it over the whole or part of which it possesses the domain. We have seen that the nation, or its Sovereign commands in all places in its possession."

Land gained from the sea, and lands permanently overflowed by the sea.

249. The territory of States which abut upon the sea may be increased or varied by oceanic agencies, to an extent and in a manner more important than the usual effects of lacustrine or fluviatile variations. In many regions the sea is (to use a common phrase) continually gaining upon the land. In others the sea is continually receding. Heavy storms and other violent phenomena of nature are often accompanied by sudden and violent alterations of the boundaries of Moist and Dry. In parts of the Sea that lie near the embouchures of great rivers, many causes, some fluviatile, some oceanic, may be found to cooperate in the work of change. In all these cases the rules of the Roman Law as to Accession are followed as closely as the nature of things will allow; and great attention is paid by Jurists to the principles of general utility. Lord Stowell's judgment in the case of "The Anne La Porte" (which was cited a few pages back*) supplies a marked instance. Bluntschli† says generally on this subject that "Le territoire d'un État peut être augmenté par Accession, et spécialement en gagnant du terrain sur

Importance of Utilitarian Principle.

Lord Stowell's judgment in "The Anne."

Opinion of Bluntschli.

* See p. 235, *supra*. † P. 179.

la mer . . . Il peut être aussi diminué par suite d'affaissement des côtes. . . . l'extension et la diminution du territoire d'un Etat résultant soit de l'action nécessaire de la nature, soit du travail libre des hommes. Comme la mer ne fait pas partie du territoire, et n'est soumise à la souveraineté d'aucun état, le recul ou l'avancement de la mer modifie l'étendue du territoire. L'histoire mentionne les changements importants survenus de cette manière, et l'on peut chaque jour constater sur ce point de petites modifications."

Title by Usucapion or Prescription.

250. It now becomes my duty to make a few remarks on the title to Property, which a State may acquire by Usucapion or Prescription. Originally these words were not identical in meaning. Title by Usucapion signified the proprietary title which was acquired by long possession in cases where the Possessor honestly believed himself to be lawful owner, although he could not prove his original legal title. Prescription meant the bar which, whether the Possessor could prove *bona fides* or not, was interposed by the Law against stale claims, and which forbade a claimant to recover property when he had neglected to assert his right for a period of time defined by the Law*. But, after the legislation of Justinian, the

* "Title by Prescription" has in certain cases in English Law a peculiar and technical meaning, which the student must not import into his conceptions of Roman and of International Law. The term "Limitation of Actions" is the term of English Law, which coresponds best with the civil term "Præscriptio." Mr. Poste, in his edition of Gaius (p. 161), points out briefly and clearly the distinction between "Limi-

difference between "Usucapion" and "Prescription" became of comparatively little importance; and the term "title by Prescription" is now very generally used as embracing all cases where a claim is based upon long possession.

Questions raised as to Prescription in International Law.

251. Sir R. Phillimore observes* that "some writers on the Law of Nations have denied that the doctrine of Prescription has any place in the system of International Law." Martens is one of these†. Sir R. Phillimore refers to Klüber as holding the same opinion; and Grotius attributes it also to the older writer Vasquez‡. But, as Sir R. Phillimore states, the opinions of these writers are (as to the test of authority) completely overwhelmed by the weight and number of the Jurists and the Statesmen who recognize Prescription as a valid foundation for title to Property in International Law. Among these maintainers of the affirmative proposition he specifies Grotius, Heineccius, Wolff, Mably, Vattel, Rutherford, Wheaton, and Burke. To these may be added Bluntschli§.

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tation" and "Usucapion." "Limitation is the extinction of a right by neglect of the person entitled—by his omission to enforce his remedy. Usucapion is the acquisition of a right by something positive on the part of the acquirer; by his strictly defined possession during a certain number of years."

* Vol. i. p. 273.

† P. 63 *et seq.*

‡ See passage cited in Bowyer's 'Public Laws,' p. 94.

§ P. 178. Bluntschli's opinion is very decisively expressed, even as to cases where the original taking of possession is proved to have been clearly wrongful. "S'il n'exista pas de titre d'acquisition spécial, et même si l'on peut prouver que la prise de possession primitive a été accompagnée de violence

252. Woolsey*, Calvo†, Bowyer, and Sir R. Phillimore himself are to be added to this list. So is Mr. Dudley Field, who, in his 'Draft Outlines of an International Code'‡, ranks Prescription as a mode by which a State may acquire property, and cites a decision of the Supreme Court of the United States that "Prescription is applicable to the title to National Property"§. Mr. Dudley Field recommends that a uniform term of fifty years should be fixed as the period necessary to found a national prescription. He refers to Vattel's arguments as to the desirability of nations fixing by agreement a general rule on this subject. Sir R. Phillimore doubts the policy of attempting this. M. Bluntschli also thinks that no arbitrary general rule as to time should be pre-appointed‖.

Authorities that Prescription is applicable to National Property.

Question whether any general rule as to term of years should be appointed.

et a eu lieu au mépris du droit, mais que, d'un autre côté, la possession paisible dure depuis assez longtemps pour que la stabilité et la nécessité de l'ordre de choses établi soient reconnues par la population, on devra admettre que l'état de fait amené par la violence s'est transformé avec le temps en état légal. On doit donc admettre au droit international une espèce de prescription; le nombre d'années nécessaire ne peut être déterminé comme en droit privé; et on ne peut en fixer d'avance les conditions. Cette prescription est indispensable, si l'on veut éviter des contestations interminables sur la formation et l'extension des états. Grotius, ii. 4, 1, a déja reconnu la nécessité pour ce principe. C'est seulement en reconnaissant au temps le pouvoir d'effacer l'injustice et de créer le droit, qu'on peut consolider chez les peuples le sentiment de leur sûreté, et assurer la paix générale."

* P. 78.

† Calvo, vol. i. p. 289.

‡ P. 22.

§ Rhode Island *v.* Massachusetts, 4 Howard, U.S. Sup. Ct. Rep. 639.

‖ P. 178. See the passage from his 'Droit International Codifié,' which has just been cited in a preceding note.

Utilitarian Reasons for recognising Prescription in International Law.

253. All considerations of general Utility impress strongly on us the importance, and in fact the necessity, of admitting the doctrine of Prescription as fully in International Law as it is recognized in Municipal Law. "The same reason of the thing," which this principle imparts into the civil jurisdiction of every country, in order to quiet possession, to give security to property, to stop litigation, and to prevent a condition of chronic bad feeling and hostility between individuals, is equally powerful to introduce this principle, for the same purposes, into the jurisprudence which regulates the intercourse of one society with another. This will appear more manifest when it is remembered that "War represents between States litigation between individuals." These last are Sir R. Phillimore's words.

Calvo on International Prescription.

In a similar spirit M. Calvo says: "Peut-on, pour les peuples et les États, considérer l'usucapion et la prescription comme des modes réguliers et normaux d'acquérir la propriété? Si l'on admet que ces deux formes d'acquisition sont fondées et légitimes en droit naturel, on est logiquement conduit à soutenir qu'elles sont également conformes aux principes du droit des gens, et que dès lors elles doivent aussi s'appliquer aux nations.

"L'usucapion et la prescription sont même, jusqu'à un certain point, plus nécessaires entre États souverains qu'entre particuliers. En effet, les démêlés qui s'élèvent de nation à nation ont une tout autre importance que les querelles individuelles: ces dernières peuvent se régler devant les tribunaux, tandis que les

conflits internationaux aboutissent trop souvent à la guerre ; il faut donc, dans l'intérêt de la paix comme dans celui de la bonne harmonie entre les nations et des progrès du genre humain, écarter tout ce qui pourrait jeter le trouble dans le droit de possession de souverains, lequel, lorsqu'il a reçu sans conteste la consécration du temps, doit être regardé comme imprescriptible et légitime. S'il était permis, pour établir la possession primordiale d'un État, de remonter indéfiniment le cours des années et de se perdre dans la nuit des temps les plus reculés, peu de souverains seraient sûrs de leurs droits, et la paix ici bas deviendrait impossible."

Burke on International Prescription.

Mr. Burke speaks of "the solid rock of Prescription" as "the soundest, the most general, the most recognized title between man and man that is known in municipal or in public jurisprudence—a title which, though not fixed in its term, is rooted in its principles in the Law of Nature itself*. In England we have had always a prescription or limitation, as all nations have against each other." Grotius says of the contrary proposition (which denies prescriptive rights in nation against nation), "*Id si admittimus, sequi videtur maximum incommodum ut controversiæ de regnis regnorumque finibus nullo unquam tempore extinguantur*: quod non tantum ad perturbandos multorum animos et bella serenda pertinet, sed et communi gentium sensui repugnat"†.

Recent Theories as to

254. I have cited fully these Utilitarian reasonings

* Vol. ix. Works, p. 449, cited in 1 Phillimore, 278.

† Lib. 2. c. 4. sec. 1, cited in 1 Phillimore, 276.

rights of Nationalities, which are not limited by Prescription.

in favour of Prescription, because some modern publicists and political writers treat the ethnological classification of mankind into Nations as far more important than the classification into States according to International Jurisprudence, as it has been generally received. They maintain the right of each nation*, as a nation, to a separate political independence; and they deny that prescriptive dominion can ever abrogate or control this right†. I believe that the recognition of such a right as imprescriptible would unsettle the order and security of the civilized world, that it would encourage the putting forward of ambitious and aggressive schemes, and that it would, on the whole, work an amount of mischief far outbalancing the evils of any oppressive dominations which it might try to subvert.

Mischievousness.

* When we want to see what is really meant by the term "Nation," we may refer to Austin, who, in vol. i. p. 239, note, defines a "nation" as "an aggregate of persons, exceeding a single family, who are connected through blood or lineage and perhaps through a common language." In Austin's judgment a "nation" thus understood is not necessarily an independent political society. Lawrence ('Commentaire sur Wheaton,' p. 155) seems to adopt Austin's definition. Mr. Dudley Field (Outlines of an International Code, p. 3) cites a passage where Fiore (Nouveau Droit International, par Pradier Fiore) defines a nation thus:—"Une libre et spontanée association de personnes qui par communauté de sang, de langue, d'aptitude, par une affinité de vie civile, de tempérament, de vocation sont aptes et prédisposées à la plus grande union sociale."

† Thus Count Mamiani, in his treatise on the Rights of Nations, declares that "Nations alone are to constitute the true and mighty individual members of the great human family:" and he denies all prescriptive rights in such matters (see pp. 30, 80, Ac-

255. More than one reason for the doctrine of Prescription are given by the old Roman Jurists. The strongest is that which I will state in the words of Professor Gousmidt of Leipsic:—"Prescription is founded upon the public interest. Its purpose is to put an end to uncertain situations, and to prevent complicated and fruitless actions. '*Humano generi patrona Præscriptio.*' '*Interest Reipublicæ ut finis sit Litium.*'" And when we remember that the "Lites of States" involve the horrors of War*, we shall feel that this maxim applies to the commonwealth of States even more forcibly than to any single political community. Our own great Jurist, Lord Stowell, in the case of the Twee Gebroeders, 3 Robinson's 'Reports,' 346, most truly laid it down as a doctrine of International Law that "*all men have a common interest in maintaining the sanctity of ancient possessions, however acquired.*"

Reasons of the Roman Jurists for the doctrine of Prescription.

256. A nation's rights of property over its territories and the things within them may be controlled and curtailed by obligations and services, the benefit of which belongs to some other State. These obligations and services are analogous to those which are recognized in Municipal Law by the Roman Jurists under the title of "Servitudes." But (as Bluntschli

Of Servitudes.

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ton's Translation). The translator, in an appendix (p. 361), cites with eulogy St. Marc Girandin's announcement that a New Public Law of Europe, "The Law of National Sovereignty," is to supersede "the old Public Law, the general principle of which was composed of Conquest and Inheritance, recognized and consecrated by treaties."

* See Phillimore, and Calvo, as cited *supra*, pp.250, 252.

Roman Law to be followed with caution.

warns us) much caution is requisite in applying to International Law the doctrines of the Roman Law as to Prædial Servitudes, Urban Servitudes, Rustic Servitudes, and other forensic distinctions*. In the remarks about to be made on International Servitudes, I shall chiefly follow those of Bluntschli.

* Bluntschli, p. 209. As to the true nature of these distinctions, see Austin, vol. ii. 844 *et seq.* Sir R. Phillimore (vol. i. p. 303) reckons among International Servitudes those which arise necessarily from the physical circumstances of States, or the reason of the thing. "Thus," he says, "a State is bound to receive the waters which *naturally* flow within its boundaries from a conterminous State. This obligation belongs to the class of '*servitutes Juris gentium naturalis*;' and here the provisions of the 'Digest' and the 'Institutes' may be said to be identical with those of International Law." On the other hand, Bluntschli (p. 209) says:— "Nous n'appellons pas servitudes internationales les restrictions apportées à la souveraineté territoriale, et qui résultent de la nécessité pour les états de vivre en paix les uns à côté des autres, comme par exemple, l'obligation de laisser les étrangers s'établir sur leur territoire, de ne pas rompre les relations diplomatiques avec tous les autres états et de ne pas s'isoler, l'obligation d'autoriser la navigation sur les grands fleuves et dans la partie de la mer dépendant du territoire; ces obligations résultent de l'existence même du droit international, et la souveraineté de l'état est nécessairement limitée par elles.

"Les *servitutes juris gentium* ou servitudes internationales n'existent jamais de plein droit; il faut toujours qu'elles soient constituées par acte spécial; elles sont un *jus singulare*; leur existence ne se présume donc jamais.

"On ne peut appliquer ici qu'avec prudence la théorie des servitudes prédiales; car il ne s'agit pas de questions dépendant de la volonté ou du caprice de simples citoyens; il s'agit du bien des peuples. La sûreté et l'indépendance des états est tout autre chose que l'inviolabilité de la propriété foncière; les restrictions apportées aux premières ont des effets très-différents de ceux des servitudes privées."

257. International Servitudes may be created by express compact, or they may be based on Prescription. International Servitudes, how created.

International Servitudes have the effect of restraining a State from the full and entire exercise of rights of dominion in one of two ways :—1. The Servitude may prevent the Servient State (*i. e.* the State which is subject to it) from free action in some particular matter. This is called a Negative Servitude—a Servitude by which the party, on whom the *onus* of it lies, is under an obligation *non facere*. 2. A Servitude may be a Servitude *Pati*, that is, may impose on the party subject to its *onus* the duty of suffering that the party, who possesses the right to put the Servitude in force, who has the beneficial *Jus Servitutis*, shall be at liberty to do something on the territory of the servient party, which would not be lawful without express permission if no such Servitude existed. Two kinds of Servitude.

258. Bluntschli gives as instances of the first kind of International Servitudes, of Servitudes *non facere*, the following cases :—

a. A State's being under an obligation not to keep up more than a certain number of troops or of ships of War, or not to fortify certain places within its own territory. Instances of International Servitudes *non facere*.

b. The obligation of a State to abstain from exercising any or full jurisdiction over the subjects of some other State within its territories.

c. The obligation to levy no duties, or only duties according to a specified limited scale, on things imported by specified foreigners, or on specified foreign articles.

d. The obligation on a State not to set up custom-houses on its territory along the frontier of some other State.

Instances of International Servitudes *pati*.

259. He gives as instances of International Servitudes of the other class (Servitudes *pati*) to which a State may be liable :—

a. The being obliged to allow passage of the troops of another State through its territories, or any portion of them.

b. The being bound to suffer the troops of another State to occupy any portion of the territory of the Servient State; or to allow another State to exercise jurisdiction, or to levy duties or taxes in such territory, or to organize and regulate postal services therein.

How International Servitudes may be terminated.

260. International Servitudes may come to an end,—

a. By agreement between the two States;

b. By the dominant State renouncing its right;

c. By non-user sufficient to raise the presumption of international abandonment.

Unsound new Theories on this subject.

261. Bluntschli adds some very ill-considered dogmas, that International Servitudes ought to be treated as obsolete and defunct when they become what he terms "incompatible with the development of International Right, or with the constitution, the public order, and the wants of the Servient State"*. If this were to be allowed, every State, which found itself burdened by a Servitude, would easily discover (and probably convince itself of) the validity of reasons why such Servitude should be looked on as

* P. 212.

opposed to the spirit of modern International Law, or to some new constitution which the dissatisfied State might be pleased to adopt, or to such State's political proclivities. To disregard treaties and prescriptive rights on such speculative grounds as these would shake the security of Property as between nation and nation, and would furnish a perilous precedent for the disregard of public faith in other matters.

Question as to the International legality of Slavery and the Slave Trade. Can man have property in man?

262. Before we finally quit the subject of Rights as to Property, we must take some notice of a subject which has been regarded by civilized Mankind in general, and especially by Englishmen and Anglo-Americans of the last four or five generations, as one of deep importance and painful interest. It is a subject involving questions which very recent events have induced many Jurists, as well as many Politicians, to urge and discuss with redoubled zeal, and in a very bold spirit of innovation on long established usages. *I* mean the subject (or rather the connected subjects) of Slavery and the Slave Trade, and the question whether human beings can ever be regarded as the property of other human beings, as *Res positæ in Commercio,* according to either International Moral Law or International Positive Law.

Effect on the agitation of this question produced by recent events. The abolition of Slavery in the United States. The emancipation of the Serfs of Russia.

263. Of the recent events to which I allude as having stimulated the agitation of this question, the first, and incomparably the greatest, is the general Abolition of Slavery throughout the United States of America. The second is the Emancipation of the Russian Serfs by the present Emperor Alexander II.

The late revelations of the horrors of the inland African Slave Trade, as well as of the coast traffic in slaves.

Thirdly, I place the revelations which Livingstone, Baker, and other travellers have lately made of the hideous amount of desolation and cruelty which the Slave Trade causes throughout the greater part of the interior, as well as along the coasts of Africa—of the brutalization, as well as of the physical misery, which it inflicts upon the inhabitants of that continent.

How the subject is now dealt with by Bluntschli.

264. I will quote some instances of the manner in which many Publicists now speak of such topics. In 1874, we find Professor Bluntschli, in his 'Droit International Codifié,' maintaining as a fixed proposition of Jurisprudence that:—"Il n'y a pas de propriété de l'homme sur homme"*. He says that "Ce Principe, indiqué par la nature, et connu déja des Jurisconsultes Romains, a été méconnu pendant des siècles par les peuples, à leur plus grand préjudice. . . . On ne devra plus à l'avenir laisser les états, sous prétexte qu'ils sont souverains, introduire ou conserver chez eux l'esclavage; on devra cependant respecter les mesures transitoires prises par un état pour faire arriver graduellement les esclaves à la liberté."

In other paragraphs† he says:—"Le Droit international ne reconnaît à aucun état et à aucun particulier le droit d'avoir les esclaves." "Le commerce des esclaves et les marchés d'esclaves ne sont tolérés nulle part. Les Etats civilisés ont le droit et le devoir de hâter le renversement de ces abus partout où ils se rencontrent." Heffter, in his treatise on

By Heffter.

* P. 213, ed. 1874.

† Paragraph 361, p. 214, and paragraphs 362, 363, *ib.*

'Le Droit International de l'Europe' (p. 116, edition of 1867), speaks of "the principle that Slavery exists no longer" as being nearly enregistered in European International Jurisprudence. Mr. Dudley Field, in his 'Draft Outlines of an International Code' (published in 1872), inserts a clause* declaring that "Man is not the subject of ownership. Every human being is a person—that is to say, a being capable of acquiring rights and exercising them; and no one is subject to slavery or involuntary servitude, except in punishment for crime, whereof the party shall have been duly convicted." The next paragraph in his projected Code ordains that "If by the Law of any nation, not a party to this Code, the slavery of human beings is permitted, such slavery is local, and the slaves become free on coming within the jurisdiction of any free nation or State; and such nation or State is bound to respect and defend their liberty." In an earlier part of the same Code, which defines the crime of "Piracy," it is declared that every "person is to be deemed a pirate who, beyond the territory of any nation, reduces to slavery, or holds in slavery, any person whatever; or conveys, or receives with intent to convey, any person whatever as a slave"†.

By Dudley Field.

265. I am not going to introduce here an essay on the History of Slavery and the Slave Trade; I will only briefly remind my readers of the wide difference

* Paragraph 539, p. 377.

† P. 33. Mr. Dudley Field adds that "the Acts specified in this subdivision, when committed within the territory of any nation, are to be left to local law."

Different feelings formerly prevalent on these subjects.

between the spirit of the passages just laid before them, and the spirit in which even just and wise men in England generally regarded such subjects down to the last part of the eighteenth century*. And long

* "For a very long time England, while considering itself to be highly enlightened and civilized, looked (as other enlightened and civilized European States looked) complacently and approvingly on the existence of slavery in the West-Indian colonies, and on the vigorous practice of the slave trade, by which these colonies received fresh supplies of servile negro population. It was even thought laudable policy to become slave-carriers for other nations. Statesmen of all parties in the early part of the last century thought it patriotic to obtain for England the 'Assiento,' as it was termed—that is, the lucrative monopoly of bringing negroes from West Africa to the Spanish American Dominions. Towards, however, the end of the century, men were found who thought and spoke differently; and they were men whose words were weighty. Dr. Johnson was one of the first of them. Wilberforce and other statesmen also came forward, who gave a practical cooperation in Parliament to the strong efforts which Clarkson, Zachary Macaulay, Stephen, and others were making against the maintenance of the slave trade. An Act prohibiting British subjects from engaging in any way in the slave trade was passed in 1807. Then the struggle was continued for the overthrow of slavery itself, which was effected in 1833. In that year an Act was passed by the imperial Parliament, by which slavery was abolished in all British colonies, and £20,000,000 sterling were voted as compensation to the slave-holders."—*Imperial and Colonial Constitutions*, p. 361.

A great blow to Slavery had been dealt in England in 1771 by the judgment of the Court of King's Bench (Lord Mansfield being Chief Justice) in the case of "Somersett the Negro." Before that time the sale of negroes by bargains made at the Royal Exchange in London, and similar public places, was not uncommon. But the Court then declared that no kind of Slavery could be recognized by the English law as valid in England, except the ancient and long obsolete *status* of villeinage. Lord Mansfield said that "*The state of Slavery is of such a nature that it is in-*

after England had freed herself of slave-holding and slave-traffic, the most active States and the most energetic politicians in the great Anglo-Saxon community westward of the Atlantic maintained and advocated Slavery with indomitable zeal, and generally successful vehemence. It is true that the Maritime Slave Trade (that is, the importation of fresh negro bondmen from Africa into America) was prohibited by the United States not long after they became independent, and was declared by their legislature in 1820 to be Piracy. Brazil prohibited it in 1830; and nearly all the powers of Europe have done the same. But the traffic in home-bred negroes (including hundreds and thousands of unhappy beings in whom the admixture of African blood with European was hardly perceptible) flourished in America

African Slave Trade generally forbidden.

Traffic in Home-bred Slaves continued.

capable of being introduced on any reasons, moral or political, but only by positive law." "It is so odious that nothing can support it *but positive law.*" (See the comments on this case in 1 Phillimore, 336, and Wheaton, 'Histoire du Droit des Gens,' t. 2. p. 353.) In the subsequent case in the King's Bench of Forbes *v.* Cochrane, 2 B. C. 463, upholding the same doctrine, it was said by the Court that a right in persons in their character of Slaves cannot be "considered as warranted by the general law of Nature." "The law of Slavery is a law *in invitum.*" "When they [the Negro Slaves] got out of the territory where they became slaves to the Plaintiff, and out of his power and control, they were by the general law of nature made free, unless they were slaves by the particular law of the place where the Defendant received them." The French Courts had long previously recognized the principle that foreign slaves became free on touching the soil of France. See 1 Phillimore, 340; Wheaton, 'Histoire,' vol. ii. p. 355. Other cases on this subject will be referred to presently.

until the third year of the recent Civil War between the Northern and Southern States.

American Civil War between Northern and Southern States. Abolition of Slavery not originally designed by the Northern leaders.

266. That war, although it led to the abolition of Slavery in the United States, was not undertaken or carried on by President Lincoln and the other chief Statesmen of the North for that purpose. Their declared object was to save the Union, and not to meddle with Slavery*. The President considered that he had no lawful right to interfere with Slavery in the States where it existed.

But it became a necessary result of the War.

But as the struggle was prolonged, and the gigantic powers of the Slave-holding South developed themselves more fully and more formidably, the Northern chiefs found that new measures in order to weaken those powers were indispensable, and "military events by degrees rendered the abolition of Slavery an unavoidable necessity." This was effected by a Proclamation issued on the 1st day of January, 1863.

Liberating Proclamation of January 1, 1863.

267. President Lincoln himself said of this great liberating measure, "I claim not to have controlled events, but confess plainly that events have controlled me. It is the work of God"†. And in one of the last clauses of the Proclamation itself he uses the words (which to us, who know how soon his assassination followed, seem spoken from out of the shadow of the grave), "Upon this act, sincerely believed to be an act of Justice, warranted by the Constitution upon military necessity, I invoke the considerate

* See Draper's 'History of the American Civil War,' vol. iii. pp. 596, 597.

† Draper, vol. ii. p. 611.

judgment of mankind, and the gracious favour of Almighty God."

Present practical questions for the abhorrers of Slavery to deal with. Apparent desirability of strong summary measures.

268. The practical question for those, who believe this act to have been both just and good, is whether Civilized States should now promptly and energetically act in the same spirit, by refusing to recognize any rights of Property as created by Slavery, by forcibly liberating Slaves, and by forcibly suppressing Slave-trading in every part of the globe where it is found to be practised; treating it as a self-evident crime against humanity, for which all who take part in it are justly liable to suffer severest punishment at the hands of any one who has the power to inflict it.

Reasons for cautious procedure.

269. Desirable as such summary measures may appear to be in order to purge the earth from foul evil, there are grave reasons for caution as to adopting them.

The great Roman Jurists may be consulted.

270. Here, as in so many other cases, we shall gain valuable light, both theoretically and practically, by consulting the great ancient masters of Roman Law.

271. Far wiser in this respect than the highest Greek Philosophers, the Roman Jurists taught expressly that all men are free by nature*, and that

* Ulpian, as cited in the 1st Book of the 'Digest,' Title 1, says of Manumission:—"Quæ res a jure gentium originem sumsit, utpote quum jure naturali omnes liberi nascerentur, nec esset nota manumissio quum servitus esset incognita. Sed posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis; et quum uno naturali nomine homines appellarentur, jure gentium tria genera esse cœperunt: —liberi; et his contrarium servi; et tertium genus, liberti,

Slavery is contrary to Natural Law. Indeed they went further, and maintained that by Natural Law all men are equal*.

What the "Natural Law" was which the Roman Jurists considered to be violated by Slave-holding.

272. The Natural Law here spoken of in the 'Digest' means that Law of Nature, which the Jurists of the golden age of Roman Jurisprudence (that is, from Cicero's time down to the conclusion of the reigns of the Antonine Emperors) adopted from the Stoic Philosophy, and which was believed to embody the dictates of Right Reason, from which Nature—that is, the whole orderly system of the Universe (Κόσμος), moral and intellectual, as well as material and sensual, receives its being and its government.

What the *Jus Gentium* was by which Slavery was instituted.

273. The Roman Jurists believed that the leading principles of this Natural Law are to be traced in the Laws of all Nations, thus making up a Law common to all Nations. But although this "Law common to all Nations," this *Jus Gentium*, is generally derived from the Law of Nature, and therefore to a very great extent is identical with it, it is not so altogether, nor in all instances. Foreign elements—elements sometimes alien from, sometimes hostile to, Natural Law—have been added by human legislatures and tri-

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id est hi qui desierant esse servi." See also the passage from the Jurist Florentinus in the same title. According to him Slavery is "Constitutio juris gentium, quâ quis alieno dominio contra naturam subjicitur."

* "Quod ad Jus Naturale attinet, omnes homines æquales sunt."—Ulpian, cited in the 50th book of the 'Digest.' Austin (vol. i. p. 398) has exposed forcibly the "gross misconception" of some modern writers, who have railed at the Roman Jurists for degrading the slave to a level with *things*.

bunals, *contra rationem juris*. And in some cases so many nations have concurred in the adoption of certain usages and institutions not springing from the Law of Nature, that such usages and institutions have become parts and parcels of the *Jus Gentium*, and must be recognized as such, until right reasoning persuades the nations to renounce them, and to purify the *Jus Gentium* from the tainting dross. But this purifying process is to be effected by peaceful reforms, conducted by Legislatures and by Jurists, not by hasty innovations or revolutionary violence. Such were the principles and such was the practice of the great Jurists of old Rome. They avoided conceited temerity in working out theories. They showed deep respect for sentiments of order, for ancient usage, for public opinion, and especially for the general opinion of the legal profession. At the same time they kept steadily in view an ideal pattern of Jural excellence, by which prudent and much-needed reforms might be fashioned, and according to which deficiencies might be filled up at convenient seasons. From the spirit also of this ideal perfect Law they could always obtain right canons of interpretation for the solution of doubts, and for practical choice among difficulties. By thus abstaining, and by thus acting, the intellectual chiefs of Rome's golden Jural age, from Aquillius* and

How this *Jus Gentium* is to be restored to harmony with *Jus Naturæ*.

The splendour and the enduring value of the Golden Roman Jurisprudence due to the prudent practice, as well as to the bold theories of Rome's great Jurists.

* C. Aquillius Gallus, Cicero's colleague in the Prætorship, B.C. 66, seems to have been one of the earliest and sagest of the new school of Jurists at Rome, who changed the character of the Roman legal system, in which arbitrary di-

Cicero down to Ulpian and Modestinus, acquired for their country's law its unrivalled lustre, and its undying powers of benefiting the human race*.

Consistency of the Roman Jurists in their treatment of Slavery.

274. The Roman Jurists were therefore thoroughly consistent with the general rules of their best school when they taught that the servile bondage of human beings is a violation of the Law of Nature, and yet they did not deny its legality so long as it formed part of the *Jus Gentium*.

General prevalence of Slavery.

275. No one, who is even moderately conversant with history, can doubt that as a matter of fact the Romans were right as to the early and the general prevalence of Slavery, and as to its recognition by the laws of all, or of almost all nations, including the most as well as the least civilized. Roman Jurisprudence necessarily acknowledged, even while it

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stinctions and technicalities had previously worked as extensively and iniquitously, as we have seen them operate in the law-courts of England. Some of the most valuable of the law-reforms of Aquillius are referred to by Cicero in the 'De Officiis,' lib. 3. We may hope that we now (1875) are about to see the promised blending of Law and Equity make legal improvement here as rapid as it was in the law of Rome, after "the stimulus of the theory of Natural Law was applied to it" (see Maine, p. 57). But for this to be ensured, our laws must be administered as well as framed in the true liberal Prætorian spirit.

* With respect to the opinions here expressed as to the occasional opposition between *Jus Naturale* and *Jus Gentium*, and for the spirit in which the Roman Jurists worked out or refrained from changes, see p. 12, *suprà*, and note, and the authorities there cited, especially the chapters of Sir H. Maine's 'Ancient Law.' See also Savigny, 'Traité du Droit Rom.' vol. i. ch. 2, cited by Sir George Bowyer in 'Public Law,' p. 123.

stigmatized, the relationship of owner and bondman; and however much we may value the now common and rapidly growing change of public opinion on the subject, it is impossible to find any such general renunciation of Slavery by the great Commonwealth of States, or even by the civilized portion of it, as can justify us in assuming that it is no longer to be regarded as an institution, such as it was viewed by the Statesmen and Judges of Rome. The subject of the lawfulness of trafficking in Slaves is to a great extent part and parcel of the main subject, whether there can be lawful property in a Slave; although violences and horrors have been, and are, connected with certain branches of Slave-trading, which (as we shall see) may justify, even in a strictly international view, the forcible interference of foreigners to put an end to such crimes under special circumstances. But, as a general principle, the right to deal in Slaves must depend upon the right to have Slaves.

Slavery never renounced by the great Commonwealth of States.

276. It would occupy an undue amount of space in this volume if I were here to go through *seriatim* all the cases on this subject, that have been brought before various European or American tribunals, or have formed the subjects of public discussion by Statesmen. The leading case has always for the last half century been considered to be the case of 'Le Louis'*, in which "the whole subject underwent a most full, elaborate, and profound discussion"†, and in which Lord Stowell delivered one of his most

Numerous decisions of European and American tribunals. Only leading cases to be mentioned here.

Leading case, Lord Stowell's judgment in 'Le Louis.'

* 2 Dodson's 'Admiralty Reports,' 210.

† Kent, 1 Comment. p. 208.

luminous and masterly judgments. He pronounced that the Slave Trade, though unjust and then condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. He said that "to make it piracy, or such a crime, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a general convention. On the contrary, it had been carried on by all nations, even by Great Britain herself, until within a few years, and was then carried on by Spain and Portugal and not absolutely prohibited by France. It was therefore not criminal traffic by the law of nations; and every nation, independently of treaty, retained a legal right to carry it on. *No one nation had a right to force the way to the liberation of Africa by trampling on the independence of other states, or to procure an eminent good by means that were unlawful, or to press forward to a great principle by breaking through other great principles that stood in the way.*"

Leading case in the American Courts.

277. Chancellor Kent says that the final decision of the question in America has been the same as in the case of the 'Le Louis.' "In the case of the 'La Jeune Eugénie' it was decided in the Circuit Court of the United States in Massachusetts, after a masterly discussion, that the Slave-trade was prohibited by universal law. But subsequently, in the case of 'The Antelope,' the Supreme Court of the United States declared "that the Slave-trade, though contrary to the law of Nature, had been sanctioned in modern times by the laws of all nations who possessed distant

'The Antelope.'

colonies; and a trade could not be considered as contrary to the law of nations which had been authorized and protected by the usages and laws of all commercial nations" *.

278. We must therefore not only confess that there is a want of proof that the old *Jus Gentium* as to Slavery has been reversed, but we must admit the fulness and clearness of the judicial decisions which acknowledge, even while they deplore, its continuance. Progress has been made thus far, that the civilized nations of Europe and America now concur in regarding Slavery as being contrary to Natural Law and morality †.

What progress has been made towards a *Jus Gentium* untainted by Slavery.

* Kent, vol. i. p. 209. The case of 'The Antelope' is reported in 10 Wheaton's 'Supreme-Court Reports,' p. 66. An important extract from the judgment will be found cited in a note to a page *infra* of this chapter.

† See the English decisions as to Somersett the Negro and Forbes *v.* Cochrane, and the old French decisions, already cited in note to p. 262. Add to these the case of 'The Amedie,' 1 Acton's Reports, 240, in which Sir W. Grant, in his judgment, maintained that "the claimant [for restoration of a cargo of slaves], to entitle him to restitution, must show affirmatively a right of property under the municipal laws of his own country; for if it be unprotected by his own municipal law, he can have no right of property in human beings carried as his slaves; for such a claim is contrary to the principles of Justice and humanity." See also the similar case of 'The Fortuna,' 1 Dodson, 31. Add to these the American decisions cited by Principal Woolsey, page 113, n. from the 'Louisiana Reports;' and see the State Papers that passed in 1841 between the English Government and that of the United States in the case of 'The Creole,' a vessel belonging to a citizen of Virginia, then a slave-holding State. He had on board of her 135 negro slaves. The Slaves rose upon the crew, overmastered them, and compelled them to take the ship into the British port

Maxim recognized that "The Air makes free,"

279. The chief States of the civilized world also now generally recognize the principle that "the Air

of Nassau, where the slaves landed. The Americans claimed that they should be given up to their master. This was refused by the British Government, except as to the extradition to the American authorities of certain individuals who were charged with murder. The rest remained in freedom on the British territory. The comments on this case of Mr. Wheaton ('Histoire,' vol. ii. 358) on the one part, and of Sir R. Phillimore, vol. i. p. 343, deserve attention. Principal Woolsey (p. 113) evidently considers that the British Government was in the right.

See also the *dictum* of Savigny (cited by Woolsey, *ibid.*), that "Slavery as a legal Institution is foreign to our polity, and is not recognized by it; and at the same time, from our point of view it is something utterly immoral to regard a man as a thing." Add that of Story, cited by Phillimore:—"The state of Slavery will not be recognized in any country whose institutions and policy prohibit Slavery."

On the other hand, there are to be considered the case of Madruzo *v.* Willes (3 Barnwell and Alderson, 353), in which the judgment of the Court of King's Bench (following the doctrine of Lord Stowell in 'Le Louis') pronounced that the British Statutes against the slave trade were only applicable to British subjects, and only rendered the slave trade unlawful when carried on by them. "The British parliament could not prevent the subjects of other states from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations she is thereby subject to condemnation; but it is impossible to say that the slave trade was contrary to the law of nations. It was until lately carried on by all the nations of Europe; and a practice so sanctioned can only be rendered illegal on the principles of international law by the consent of all the powers. Many states had so consented, but others had not; and the cases had gone no further than to establish the rule that ships belonging to countries that had prohibited the trade were liable to capture and condemnation if found engaged in it."

There is also the strong case of "The Queen *v.* Serva and others" (Denison's 'Crown Cases Reserved,' vol. i. p. 154), decided in 1845 by the English

makes free;" and a person who is taken, or who makes his way from a country where he was a slave, to a country where slavery is unknown, becomes instantly a freeman; and he retains his natural *status* of freedom, even if he should revisit the country which had been the scene of his old slavery*.

and the freedom so regained is permanent.

280. We may go further; and we may treat as a sound doctrine the proposition that the presumption of the Courts is always against the legality of Slavery. As Slavery is contrary to the principles of Justice and humanity, and is forbidden by Natural Law, he who founds any claim on it must show some Positive Law which, in his special case, gives it an artificial sanction. If he can show that the municipal law of his own country allows Slavery, and if the case be one to be governed by such municipal Law, the Courts of civilized States in general will, however reluctantly, acknowledge the validity of such claim: but the *onus probandi* lies on the claimant†.

Presumption of the Courts against the legality of Slavery in every case.

281. All this, however, falls very short of the new

Judges in a court of criminal appeal. Sir R. Phillimore (vol. i. 334) remarks on it that the decision must have been partly founded on the proposition that *Jure Gentium* the Slave Trade was not Piracy.

See also the case of Burun *v.* Denman, 2 Excheq. Rep. 186, in which Lord Wensleydale (then Baron Parke) referred to and fully recognized the doctrine of Lord Stowell in 'Le Louis,' which has been already cited.

* See Woolsey, p. 113, and the cases in the 'Louisiana Reports' cited by him. See, too, note at p. 262, *suprà*, and see the comments already made on the cases of Somersett the Negro and Forbes *v.* Cochrane.

† See the case of the 'Amedie' already quoted, and the case of the 'Antelope,' 10 Wheaton, S. C. R. 66; and see the note to p. 210, vol. i. of Kent's 'Commentaries.'

rules, which enthusiasts now wish to introduce, of refusing to recognize anywhere, or in any person, any legal rights dependent on the institution of Slavery, and of treating as crimes against human nature the holding of human beings as property, or the trafficking in them as such. This would make wild work of our dealings with most Oriental States, of our relations (for instance) with our old allies and friends the Ottoman Turks. We can use the great influence, which is providentially now possessed by civilized Christian States in general over the nations of other creeds and races, to persuade them to mitigate the worst usages connected with Slavery, and perhaps finally to abandon it. This is especially the case as to the trade in Slaves, so far as regards the practice of importing them, and of regularly exposing them for sale in public marts. But if it be conceded that the members of any particular State are to be tolerated in continuing to treat human beings as legal subjects of Property, it is impossible to maintain that the usual incidents of Property are not to follow. There must be rights of inheritance and of acquisition by contract. Still these rights, though not utterly denied, may be placed under State regulation and control, so as materially to lighten and repress the burdens and the abominations of bondage.

Danger of the extreme changes that some persons now propose.

What improvements are practicable.

Especially as to traffic in Slaves.

But right of Property involves Right of Traffic.

282. Many, and those the worst, branches of the Slave-trade, as it is now conducted, especially in Africa, might be forcibly suppressed without any violation of International Law. Wars are notoriously carried on, and desolating military expeditions are

Many of the worst branches of the Slave-Trade may be swept away without any breach of International Law.

habitually made into the territories of unoffending tribes, without the pretext of any regular warfare, for the purpose of collecting herds of captives, who are brought home by their oppressors to serve as their slaves, or, far more frequently, hurried to some mart in flesh and blood to be sold or bartered away to strangers. Where a real *bonâ fide* war, not undertaken for the mere sake of Slave-hunting, exists between two tribes, we have no right to interfere, and to prevent them from continuing the ancient and once universal practice, by which the conqueror in battle might, if he thought fit, spare the life of the conquered party, and make a slave of him, instead of killing him in the exercise of full military right*. Modern civilized nations have abandoned this system,

The African Slave-hunting expeditions.

Old right of making slaves of Prisoners of war.

* "Personal Slavery, arising out of forcible captivity, has existed in every age of the world, and among the most refined and civilized people. The possession of persons so acquired has become invested with the character of Property. Captives in war were sold as slaves by Greek and Roman commanders."—Kent, 1 Commentaries, 199. See too the passages from Bynkershoek's 'Quæstiones Juris Publici' (published in 1737), cited by Sir R. Phillimore, vol. i. 317.

There are some extremely forcible and clear remarks on this subject in the judgment of C. J. Marshall in the American case the 'Antelope' (10 Wheaton, S. C. Reports, p. 120). "From the earliest times War has existed; and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity one of these was that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all must be the law of all.

"Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced

and also the practice (of which instances are to be found at much later dates) of sending prisoners of war into slave-holding countries to be sold there*. Such conduct would now, if exercised by a European State, or by any of the American States which have been fashioned out of European colonies, be justly regarded as a breach of International Law; but we have no right to require uncivilized or semi-civilized tribes to imitate our forbearance in these matters†.

No such rights of warfare conferred on robbers of human beings.

283. But although we may not be entitled to compel such tribes to renounce the old usage of enslaving prisoners of war, when the taking of such prisoners is a mere incident of a condition of warfare, which originated in *boná fide* dispute between State and State, the case is widely different when it is a case of one State attacking another for the mere, or even for the *main* purpose of carrying off that other State's subjects as so much spoil and plunder. Such an interference with the independence and Security of the other State is itself a gross breach of International Law, and fully justifies any third State in interposing to prevent or to punish it‡. When,

Forcible interference may be lawfully quelled or punished by antagonistic forcible interference.

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by general consent cannot be pronounced unlawful.

"Throughout Christendom this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves."

* See 1 Phillimore, 317 *et seq.*

† See *suprà*, chap. vi. pp. 129–134.

‡ The subject of wrongful

therefore, a force of Slave-hunters, or of conveyers of Slaves either by sea or by land, is caught in such practices, we are fully justified in forcibly rescuing their victims, and in exacting, if possible, redress on behalf of the injured party.

Presumption should be against the Slave-hunter or Slave-carrier.

Following out the analogy of the Presumption (which has been just described) against the legality of Slavery in every case, *donec probetur in contrarium*, we should be warranted in treating any such case of slave-hunting or slave-carrying as a case of *primâ facie* international illegality, unless the persons in possession of the slaves could and did show that there was a *purum piumque duellum* between their country and the country of their captives, and that the enslavement was the fair exercise of an old right of warfare. This is in principle a very different thing from an arbitrary declaration that all Slave-trading is Piracy; but it would in practice produce quite as beneficial results.

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interference by one State justifying antagonistic interference by other States will be found discussed in that part of the next chapter, "On the collision of Rights of States," which deals with forcible intervention.

CHAPTER IX.

On the Conflict of International Rights.

Conflicts as to Security and Independence caused by inequalities of Strength.—Doctrine of "Balance of Power."—Opinions of Martens, of Vattel.—Cases of menacing Union.—As to dangerously strong States, of guardedly inoffensive demeanour.—Of precautionary measures short of War.—As to Leagues for self-protection.—Opinions of Nassau Senior, of Phillimore.—The Spanish Partition Treaties.—Macaulay's defence of them.—Interventions in another State's internal affairs.—Intervention to put down Revolution.—Wheaton, Phillimore, Nassau Senior, Chateaubriand, Martens referred to. — The Holy Alliance.—Bluntschli's observations.—Principles avowed by English Statesmen, by Lord Castlereagh and the Duke of Wellington. — Opinion of Count Mamiani. — Lawfulness of Intervention to repress Intervention. — Of Intervention in behalf of oppressed subjects.—Grotius, Vattel, Mackintosh, Mamiani referred to. — Review and summary of general principles.—As to Treaties which pledge a State to Intervene. —Their invalidity.—Other cases of Conflict of Rights.—Claims of a State to satisfaction for wrongs done to its members while commorant abroad.—Lord Selborne on the general principle.—General rule is to seek redress from the local tribunals.—Exceptional cases.—English State-Paper of 1753.—Liability of State for international offences committed by those within its territories.—The charge may be that it neglects to provide itself with proper laws, or that it does not properly enforce its laws.—Difference made by the presence or absence of *Dolus*.—Meanings of *Culpa*.—What negligence is actionable.—Light to be gained from the Geneva Arbitration.—Differences of opinion among the Arbitrators.—Serious trenching on right to Independence when one State is called on by another to alter its laws.—The Orsini ferment in England.—Limited responsibility

of State for its legal system.—Mere amount of damage cannot make conduct actionable.—*Damnum sine Injuria.*—The Defence of Necessity.—Conflict of rights as to Allegiance.

284. It has been already pointed out that there may be occasions on which the Positive Rights of one State according to International Law come into conflict with the Positive Rights of another State. We will now proceed to examine some of the most important cases of Jural collisions of this nature.

One State's menacing preponderance of power.

A conflict between the right of one State to Independence and Security with the right of other States to Security and Independence may arise when the first State acquires a preponderance of Power, which menaces the safety and free action of its neighbour.

Natural right to augment power by fair means.

"Every State has a natural right to augment its power, not only by the improvement of its internal constitution and resources, but also by external aggrandizement, provided that the means employed are lawful—that is, that they do not violate the rights of another.

Possibility of excess.

Nevertheless it may so happen that the aggrandizement of a State already powerful, and the preponderance resulting from it, may, sooner or later, endanger the safety and liberty of the neighbouring States.

Balance of Power.

In such case there arises a collision of rights which authorizes the latter to oppose by alliances, and even by force of arms, so dangerous an aggrandizement, without the least regard to its lawfulness. This right is still more essential to States which form a sort of general society than to such as are situated at a great distance from each other; and this is the reason why the powers of Europe make it an essential

principle in their political system to watch over and maintain the Balance of Power in Europe."

285. I have been quoting from Martens*, who adds, a little further on in his book, the following important observation:—"It is clear that it is not always the extent of the acquisition that ought to determine the danger. Every thing here depends on circumstances. The annihilation of a State, which at present serves as a counterpoise, may become as dangerous to the general safety of the neighbouring States as the immediate aggrandizement of another State"†.

How the Balance may be endangered.

286. Vattel, in his third book (chap. iii. sects. 42 to 49), has treated of the whole of this subject with remarkable clearness and good sense. He puts the case fairly by stating both sides of the question thus‡:—"On one side it may be said that the State, which increases its power by using all the resources of good government, does only that which is praiseworthy. The Sovereign who, by inheritance, by free election, and by any other just and honourable means unites to his dominions new provinces, even entire kingdoms, is merely exercising his rights. He does wrong to none. How then can it be permissible to attack a Power which is aggrandizing itself by lawful means? The State which attacks another cannot be authorized in taking up arms, and cannot have a just

Vattel's statement of the subject.

* P. 123.

† P. 126, note.

‡ In what follows I have not always translated Vattel literally. I have sometimes epitomized and sometimes paraphrased him, but so as always to retain his meaning.

cause of war, unless it has received an actual injury, or is palpably menaced.

287. "On the other hand, a constant and sad experience warns us that over-powerful States rarely fail to molest their neighbours, to oppress them, and even to subjugate them entirely, when they find the opportunity for doing so, and can do it with impunity. Is it to be said that we are to wait passively while the peril accumulates? Are we to allow that tempest to thicken, the first clouds of which might be easily dispersed? Are we to permit a neighbour to acquire a giant's strength, and to let him choose his own good season for using it like a giant against us? What will be the use of thinking of self-defence when the means for it have ceased to exist? Prudence in men is a duty; especially is it so in those who aspire to be the leaders of a Nation, and who are pledged to watch over its safety. Vattel continued.

"Let us try to resolve this great question conformably to the principles of Natural Right and the Law of Nations. We shall see that such principles do not lead us to imbecile scruples, and that Justice and sound Policy are inseparable.

"The simple fact of the aggrandizement of a neighbouring State cannot of itself give the right to make war against it.

"And here first let us call to mind the principle that the employment of unlawful means cannot be justified by the goodness of the end. Let no one try to answer us here by talking about the safety of the community being the supreme law of the State. The

truth is that this very same safety of the State, and the common cause of the safety of all States, forbid the usage of unjust and unfair means. Look closely into the matter, and you will see that the introduction of such means would be pernicious to human society, and fatal to the Common Weal of Nations*.

Vattel continued.

288. "The form in which the question is stated presupposes that no actual injury has been done to us by the Power which we suspect. Before, therefore, we can justly resort to War as the means of making that Power cease to be a cause of alarm, we must have good reason for believing that we are threatened by it. The mere possession of Power is not a menace of wrong-doing; the will to do wrong must be superadded. Unhappily the power and the will to oppress often coexist; but they are things not

* Vattel gives a reference here to what he had written in his second book, chap. v.:—"Toutes les nations sont étroitement obligées à cultiver la justice entre elles, à l'observer scrupuleusement, à s'abstenir avec soin de tout ce qui peut y donner atteinte," &c. I may refer here also to Count Mamiani's treatise on the Rights of Nations (p. 192, Acton's translation):—"Though it be infallibly true and certain that it is the duty of every human society to save itself, and though we be allowed also to affirm that there exists between them a tacit agreement to help and protect each other for the sake of their common safety, this must always be understood with some discretion, and never extended beyond the limits of rectitude and justice. No sanctity, no grandeur of purpose, not even any necessity or extreme pressure of an emergency, can suffice to justify the resort to means which are not good. Let our diplomatists, both of the old school and the new, take care to remember this, that the observance of a principle is beyond measure more important than the peace, order, and safety of a single or of several States."

necessarily inseparable; and the only right given by their frequent union is a right to be watchful, and to take action on the appearance of first symptoms. When a State has shown signs of injustice, of cupidity, of haughtiness, of ambition, of an imperious desire to lay down the law, such a State is a neighbour to be regarded with jealousy, with precaution; and if such a State is about to receive a formidable increase of power, we have a right to demand from it sureties to keep the peace, and, if it will not give such sureties, to anticipate its schemes by force of arms."

289. Such are the seemingly sound principles taught by Vattel. We may add that, inasmuch as in most cases "Probability is man's guide of life"*, probabilities must be studied with care proportioned to the importance of the subject. Vattel says that "When we have a State as our neighbour whose power and ambition are equally overgrown, the Probability on which we should act is to be measured by a ratio compounded of the amount of apparent menace and of the amount of the evil with which we are menaced. If it is a question of an endurable evil, or of a slight loss, nothing should be done precipitately. We may afford to wait till Probability becomes certainty. But if it is a question of a great evil, if the very safety of our own State is threatened, there must be an end of watching and waiting; we must ward off our country's ruin before it becomes inevitable.

Careful study of Probabilities necessary.

Amount of menaced evil to be calculated.

290. "Let us take another case. We will suppose that two Independent States propose to unite them-

* Bishop Butler.

Cases of such union of two States as to menace other States.

selves, so as henceforth to form a single empire. Have they not a right to do so? On what ground shall any one oppose their union? I answer, that they have a right to unite with one another, provided that their union is not accompanied with designs prejudicial to others. Now, if each of those two nations is capable singly to govern and to maintain itself, if each singly has strength enough to insure it from insult and oppression, it is fairly presumable that the object of two such States in uniting is to obtain domination over their neighbours. Such presumption becomes certainty, if signs of haughtiness and of inordinate ambition have already been displayed."

Of the course to be taken when the dangerously preponderant State keeps cautiously clear of all act or show of offence.

291. Vattel afterwards deals with the hypothesis that a State of preponderant power is so cautious in its dealings, and so observant of all rules of Positive Law, as to give no handle for imputing to it either the commission of actual injury or serious menace. Inasmuch as it is inadmissible to reduce the power of such a State by actual war merely on account of the greatness of its power, he asks, "Are other nations to look on with indifference? Are they to stand by till the rapid increase of the forces of the over-strong State sooner or later inspires into it schemes of ambitious aggression? Certainly not. War is not the only means of self-defence in such a case. The other less powerful States should form leagues and associations for their mutual self-defence, and place themselves in a position to maintain the balance of Power."

Precautions, short of war, which are then justifiable.

292. The general result of Vattel's discussion on the subject is as follows:—

Summary of Vattel's opinions.

1. The mere fact that a State has acquired and is acquiring power greatly preponderant over its neighbours does not *of itself* justify other States in making war on it for the purpose of reducing its power.

Preponderant strength not *per se* a *Casus Belli*.

2. Under such circumstances other States are justified in watching the preponderant State with cautious vigilance, and in forming leagues with each other for mutual self-defence from it.

Propriety of Precautionary leagues, and of vigilance.

3. If the preponderant State commits acts of injury against its neighbours or any of them, or if by the arrogance of its pretensions, the tone of its public despatches and manifestoes, or by any other manner of conduct, beyond the mere increase of its strength, it clearly threatens to attack or oppress its neighbours, then other States are justified in combining together and in making war on it, so as to prevent it from committing disturbance of the general security of the commonwealth of Civilized Nations, or of the security and independence of any of them.

What conduct justifies other States in actually belligerent combination.

293. In the very valuable essay on International Law by Mr. Nassau Senior, which is in the 77th volume of the 'Edinburgh Review,' the subject of Intervention to support the Balance of Power is ably discussed, and the following summary is given of what Mr. Senior considers to be the prevalent opinions of Publicists on the subject.

Mr. Nassau Senior on armed intervention to maintain Balance of Power.

"The Internal development of the resources of a country has never been considered a pretext for such an intervention, nor has its acquisition of colonies or de-

What causes are insufficient.

pendencies at a distance from Europe. It seems to be felt, with respect to the latter, that distant colonies and dependencies generally weaken, and always render more vulnerable the metropolitan State. With respect to the former, although the increase of the wealth and population of a country is the most effectual means by which its power can be augmented, such an augmentation is too gradual to excite alarm. To which it must be added that the injustice and mischief of admitting that nations have a right to use force for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbours, are too revolting to allow such a right to be inserted even in the lax code of International Law. Interferences, therefore, to preserve the balance of power have been confined to attempts to prevent a sovereign, already powerful, from incorporating conquered provinces into his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils of an independent State."

What causes have been treated as sufficient.

294. We may find in Sir Robert Phillimore (part iv. chap. i. part 2) a very good historical sketch of the progress of the principle as to Balance of Power. And we may usefully add to this a study of the Partition Treaties which were formed, in 1698 and 1700, by several of the chief powers of Europe for the dismemberment of the Spanish Monarchy, in order to prevent any one Power from being unduly aggrandized by the acquisition of the vast entirety. The best defence that can be made for those projects, as internationally justifiable, will be found, I believe, in the 5th volume

of Lord Macaulay's History*. A zealot for William III. will probably think that defence successful. To others it may appear that the direct gross injury of violently dismembering an unoffending State against its will, far outweighs any speculative good that can be effected by preventing a possible disarrangement of the Political Equilibrium of Europe.

Intervention in the internal government of another State.

295. Intervention by one State in the internal affairs and domestic politics of another State is, in the very nature of things, a grievous violation of that other State's right of self-government; and we are to remember that a capacity for self-government is one of the essential elements that constitute a State†. At first sight it would seem impossible to make any colourable excuse for such an interference with primary principles; but in practice no kind of Intervention has been more frequent, especially during the last hundred years.

296. The pretexts for it may be various.

Common forms of this.

First, there is Intervention by Monarchical States in the proceedings of States which have deposed their kings, or greatly limited their monarch's power, and which have (in the common phrase) revolutionized their Governments and Institutions. This form of Intervention has been by far the most frequent. As Mr. Nassau Senior has observed, "A remarkable similarity runs through all the State Papers in which this right of Intervention is asserted. They generally begin by disclaiming the wish to interfere with the affairs of any independent State; they then set forth

Intervention to put down Revolution.

* Page 131 *et seq.* † See *suprà*, 98.

Usual pretexts.

the inconveniences suffered by their own frontiers in consequence of the disturbed condition of their neighbours; they add that the doctrines professed and the examples held out are subversive of the general tranquillity of Europe, and particularly of that of their own dominions; and they therefore propose to take military possession of the disturbed country, with no views of aggrandizement, but simply in self-defence.

It is seldom, however, that a State rests its interference in the affairs of an independent neighbour on the bare ground of inconvenience or danger to herself. She generally supports her invasion by the further pretext that it is for the purpose of redressing some injury suffered by some class, or even by some individual of the invaded nation; and she usually asserts that the interests of the class, or of the individual whose side she espouses, are those of the nation as a whole."

Intervention to aid established Government against Revolt.

297. Closely akin to this species of intervention is that, where part of the population of a State is in revolt, and is struggling more or less successfully to obtain release from what it asserts to be oppressive misrule, and another State intervenes with armed force, suppresses the revolt, and leaves the defeated party to the mercy of their old masters. Such was the armed interference of Russia in the affairs of the Austrian Empire, by which the Hungarian insurrection was crushed in 1849.

Wheaton's, Phillimore's, and Nassau Senior's Historical

298. In Wheaton and in Phillimore, and in Mr. Nassau Senior's essay, so often referred to, will be found admirable historical sketches of the Interven-

tions in recent times against what are called Revolutionary and anarchical principles. The list includes the invasion of Holland by the Prussians in 1787, to restore to his old prerogatives as Stadtholder the Prince of Orange, who was brother-in-law to the Prussian King. It includes the infamous and pernicious attacks on Poland by Austria, Prussia, and Russia; the invasion of France in behalf of Louis XVI. by the Prussians and Austrians in 1791; and the interference of the Holy Alliance with the popularized Governments of Spain, Naples, Sicily, and Piedmont in 1820 and the three following years. The historical student of those transactions will be fully qualified to form a judgment as to whether such proceedings are calculated to promote or to impair the general benefit of the community of Nations.

Sketches of Intervention of this kind.

299. I have referred to liberal writers. I will quote also, *ab alterâ parte*, the justification set forth by Chateaubriand, the ablest and most eloquent champion of the Holy Alliance, of the French intervention to restore King Ferdinand to absolute power in Spain.

Chateaubriand, in his celebrated speech in the French Chamber, dealt thus with the question of Intervention:—

"Has a Government of one country a right to interfere in the affairs of another? This great question of International Law has been resolved in different ways by different writers on the subject. Those who incline to the natural right, such as Bacon, Puffendorf, Grotius, and all the ancients, maintain that it it is lawful to take up arms in the name of the human

Chateaubriand's Arguments for the French intervention in Spain in 1823.

race against a society which violates the principles on which the social order reposes, on the same ground on which, in particular States, you punish an individual malefactor who disturbs the public repose. Those who consider the question as one depending on civil right, are of opinion that no one Government has a right to interfere in the affairs of another. I adopt, in the abstract, the principles of the last. I maintain that no Government has a right to interfere in the affairs of another Government. In truth, if this principle is not admitted, and above all by all people who enjoy a free constitution, no nation could be in security. It would always be possible for the corruption of a Minister, or the ambition of a King, to attack a State which attempted to ameliorate its condition; in many cases wars would be multiplied; you would adopt a principle of eternal hostility—a principle of which every one would constitute himself judge, since every one might say to his neighbour, your institutions displease me; change them, or I declare war.

"But when the modern political writers rejected the right of intervention by taking it out of the category of natural to place it in that of civil rights, they felt themselves very much embarrassed at the result; for they saw that cases will occur in which it is impossible to abstain from intervention without putting the State in danger. At the commencement of the revolution it was said, 'Perish the Colonies rather than one principle;' and the Colonies perished. Shall we also say, 'Perish the social order rather than sacrifice a principle,' and let the social order perish? In order

to avoid being shattered against a principle, which they themselves had established, the modern jurists have introduced an exception. They said no Government has a right to interfere in the affairs of another Government, except in cases where the security and immediate interests of the first Government are compromised"*.

300. Martens†, after laying down the rule that "foreign nations have not the least right to interfere in affairs that are purely domestic," makes a similar exception, and says that the foreign State may have a positive right to intermeddle "if its own preservation requires to take part in the quarrel." Principles stated by Martens.

301. We may admit the exception, as well as accept the rule; but the question in such case will be, "What is the kind and amount of the danger that can justify a foreign State in taking prompt action against a troublesome neighbour? Clearly the danger, in order to amount to a justification for a war of intervention, must be a danger which directly affects the vital and substantial interests of the foreign State, considered as a State. There must be a danger of actual outbreak of hostilities, or something equally practical and real. England was thus endangered by Revolutionary France, when she went to war with France in 1793‡. The French Convention had issued Amount of danger which can justify intervention. Case of England's danger from Revolutionary France in 1793.

* Cited in Alison Hist. Europe, ii. 626.

† Page 69.

‡ In point of fact it was France that declared war against England in 1793. But as England had previously recalled her own ambassador from Paris, and had dismissed M. Chauvelin, and had commenced the increase of her naval and military forces, the distinction is not material.

a decree, by which it was announced that the French armies were to give assistance to every people which desired to recover its liberty—that is to say, to the democratic party in each nation which desired to overthrow the royal and the aristocratic parties. By a supplement to that decree the French nation declared that France would treat as an enemy the people which, refusing to accept or renouncing liberty and equality, should wish to keep, to recall, or to negotiate with its princes or its privileged castes; and the French minister of marine issued an official circular to the seaports of France, which declared that the French 'would fly to the succour of the English, would make a descent on the island, would lodge there fifty thousand caps of liberty, plant there the sacred tree, stretch out their arms to their republican brethren. and the tyranny of the Government would be destroyed.'"

Thus directly menaced with aggressive intervention at home, the English ministers of the day were quite justified in taking measures for armed self-defence, and for hostilely confronting the hostile Government, which thus threatened the independence and security of their country.

Different position of Revolutionary Spain towards Royalist France in 1823.

302. But in 1823 Spain was not menacing France. No one pretended to think it probable that troops from the South of the Pyrenees would cross the frontier to light up civil war, and to impose by force of arms any special form of constitution on the French nation. The danger amounted to this, and to this only—that the Bourbon dynasty in France seemed likely to be put under constitutional restraint by the French

nation itself, if the efforts of the Spanish nation to curb the Bourbon dynasty in Spain proved successful.

No dread of mischief of this kind, which, if real, affects not the independence of the State, but merely the interests of a party in it, no mere dread of the possible evils of bad example can justify war against another Nation for freely using its rights of self-government. Professor Bluntschli has truly said that "History has passed its sentence on the scheme of the Holy Alliance. It has stripped bare and exposed the absurdities and dangers of such a system. Their theory of the rights of Kings is merely puerile. The right and the duty of governing a people (things inseparable) are not a family property. A People is a living entity. A King cannot be considered distinct from his people as the proprietor of the flock. He makes a mere part of the people as chief of the people"*.

Bluntschli's comment on the Holy Alliance.

303. There are few passages in modern English Statesmanship, which it is more gratifying to review, than the firm and consistent opposition to the doctrines of the Holy Alliance, which was made not only by Brougham, Mackintosh, and other leaders of our Liberal party, but by our ministers also, though our Government was then Tory of the deepest dye.

England's opposition to the Holy Alliance.

Lord Castlereagh, who then was Secretary of State for Foreign Affairs, issued, in the beginning of 1821, a State Circular, which officially declared on behalf of the British Ministry and nation that "no Government was more prepared than their own to uphold

Lord Castlereagh's Circular of 1821.

* Page 49.

the right of any State or States to interfere, where their own security or essential interests were seriously endangered by the internal transactions of another State; but that the assumption of such a right was only to be justified by the strongest necessity, and to be limited and regulated thereby; that it could not receive a general and indiscriminate application to revolutionary movements, without reference to their immediate bearing upon some particular State or States; that its exercise was an exception to general principles of the greatest value and importance, and to be regarded as one that only grows out of the circumstances of the special case; and the exceptions of this description could never, without the most utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations"*. Chancellor Kent, who cites this British State-Paper†, says of it, that "The limitation to the right of interference with the internal concerns of other States was defined in this instance with uncommon precision; and no form of civil Government, which a nation may think proper to prescribe for itself, can be admitted to create a case of necessity justifying an interference by force; for a nation under any form of civil policy, which it may choose to adopt, is competent to preserve its faith, and to maintain the relations of peace and amity with other Powers."

Chancellor Kent's comments on this.

304. So at the Congress at Verona in 1822, the

* Lord Castlereagh's Circular Despatch of January 19, 1821.

† 1 Vol. Com. p. 24.

Duke of Wellington emphatically told the Emperor Alexander and the Emperor Francis, that "All, for which England pleaded, was the right of nations to set up over themselves whatever form of government they thought best, and to be left to manage their own affairs, so long as they left other nations to manage theirs"*.

The Duke of Wellington's Declaration in 1822.

In these homely sensible words we hear the conclusion of the whole matter. If we wish to find the rule more fully and technically stated, we may use the words of Count Mamiani in his Treatise on the Rights of Nations, and say, that "In a judicial point of view all those actions of a State, which are internal, are free; and all those actions are absolutely internal, from which no other immediate effect proceeds outside than by the efficacy of their example, and by the inevitable communication of opinions and sentiments."

Rule as stated by Count Mamiani.

305. It is, however, always to be remembered that armed intervention becomes lawful and proper, and sometimes even quite necessary, when its purpose is to prevent or to repel the wrongful intervention of others." I am again quoting Count Mamiani, who adds, "We think nobody will affirm that England, for instance, had not a good and complete right to interfere in 1826 in Portugal against the help of arms, money, and soldiers, which was furnished, now

Lawfulness of armed Intervention to repress the Intervention of others.

* Cited by Count Mamiani at pp. xx, xxi of his Preface. He quotes also a State-Paper by Lord John Russell, which states that the policy of England has been directed by the principle of withholding her consent to acts of intervention by force to alter the internal government of other nations (p. 358).

openly and now underhand, by Spain to the Prince Don Miguel, in order to enable him to carry on the war against Don Pedro, his brother."

Wheaton on the English Intervention in Portugal in 1826.

306. The intervention of England in the affairs of Portugal in 1826, in consequence of the interference of Spain, is narrated by Wheaton in his 'Elements of International Law' with evident approbation of the conduct of the British Government. He quotes the reasons given for it by Mr. Canning, reasons which demonstrate how the conduct of Spain had made it incumbent on England to take opposite action; and which also show that the intervention in 1823 of France in Spanish affairs (already spoken of) had given England a perfect right to take a forcible part in those affairs, if she had judged it expedient to do so*.

Bluntschli on same case and on the general principle.

307. Bluntschli refers to the same event (that of the English intervention in Portugal in 1826) as illustrating the same doctrine. He states the general principle thus broadly:—"Lorsqu'une puissance étrangère intervient sans motifs légitimes, les autres États ont le droit de prendre les mesures nécessaires pour faire cesser l'intervention, et de veiller à ce qu'elle ne se soit pas exploitée à leur préjudice" †.

* Elements, vol. i. p. 86. Mr. Canning pointed out that the treaties between England and Portugal made it obligatory, and not merely optional, for England to interfere in Portuguese affairs when Spain had first taken wrongful action in the matter. But still it was the wrongful interference of Spain which gave England her right to act. He earnestly disclaimed all right to interfere as between the Portuguese themselves.

† Page 273. Count Mamiani (p. 359 of his 'Rights of Nations') quotes some remark-

308. The Principles, which we have been investigating, forbid, as a rule, another kind of interference, which is likely now and henceforth to be regarded in Western Europe and in America with more favour, than the old and more common class of intervention in behalf of established Governments against Revolutionists. The kind of Intervention in the internal politics of a State, of which we are now about to speak, occurs when a Foreign State interferes in behalf of oppressed subjects. Instances of this in modern times have been very rare; and when the right has been claimed, it has been (as Mr. Senior observes) claimed with much timidity by Princes against another Prince. Yet many writers on the Law of Nations have maintained it very explicitly and very boldly.

As to Intervention in behalf of oppressed subjects against Governments.

Advocates of its lawfulness.

Grotius, who had scruples, which it is hard not to call pedantic technicalities*, about the right of subjects to take up arms against oppressive rulers, even in extreme necessity, admits thoroughly the right of others to take up arms for them, and to protect them from injuries inflicted by their ruler†. Vattel, in the

Grotius.

Vattel.

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able passages in a paper by the late John Stuart Mill, which appeared in Fraser's Magazine, December 1859. Mr. Mill lays down as a general rule that "Intervention to enforce non-intervention is always rightful, always moral, if not always prudent."

* For a complete exposition of the causes which, *and which alone*, justify insurrection and foreign intervention on behalf of the insurgents, see Mackintosh's 'Review of the Causes of the Revolution of 1688,' chap. ix. Students of Ethics, of History, and of International Jurisprudence cannot bestow too much attention to this chapter, which is the gem of all Mackintosh's works.

† Vol. ii. p. 438.

fourth chapter of his first book, distinctly recognizes the right of subjects to take up arms against tyranny; and, when in consequence of such a revolt civil war has broken out and the nation is divided into two parties, foreign States (unless expressly barred by treaty) are, in his judgment, at liberty to give aid (if required) to the party which they consider to be in the right*. Mackintosh, after most ably examining and expounding in what cases war by an oppressed people against an oppressive sovereign is justifiable, states broadly the maxim that "Wherever war is justifiable, it is lawful to call in auxiliaries"†.

Mackintosh.

Objections to their doctrines.

309. But the opponents of intervention urge with great force, that when disputes among members of a State are being carried on by members of the State only, no foreign State has a right to side with either party. Mamiani says, "You cannot assist one party with your arms or treasures without not only becoming an enemy and an offender against the other party, but outraging also both of them in their common and supreme right to have the self-rule of their country respected and uninjured, and to have its internal condition decided by no other means than by the hands and fortunes of its own citizens. And therefore, if their minds were not blinded by the fury and passions of the civil conflict, the hostile powers would make a truce with each other, and unite together of their own accord against the foreigner who thrusts between them

Count Mamiani's statement of them.

* Sects. 51, 54, and Livre 3, ch. 18, sect. 296.

† Chap. ix. of his 'Review of the Causes of the Revolution of 1688,' referred to in a preceding note.

the decision of his sword. But even though the contrary of this be done by them, and the foreigner be solicited and begged by one of the combatants, he cannot, without some criminality, yield to their entreaties and accept that guilty invitation. . . . We are well aware that there are some who pathetically exclaim that we ought in civil wars to interpose our own sword for the cessation of crimes and slaughter, and for the love and compassion of our kind. But we reply to these philanthropists, that it is allowable for them to use and try for that purpose any kind of pacific offices and mediation, but that only this injurious and arrogant employment of arms is forbidden them; because it is the first point of human compassion to preserve the right uncontaminated; and there is no comparison in amount between the blood and tears of a few short years and the infinite and unstanchable miseries which violence and injustice cause to be spread throughout this world.

He makes a general rule against such intervention.

"A very different supposition would be that of a people which has been subjugated, and which, after constantly refusing to constitute and to have one sole country along with its oppressor, at length arises in fierce insurrection, and makes a supreme effort to recover its liberty; as we read of the Dutch people against the Spaniards, of the Swiss against Austria and Burgundy, and of the Greeks in our own days against the Moslem. Everybody must perceive that in this case the question is not one of intestine war, or of the contending parties within one people. We should therefore decidedly call the intervention of

His exceptional cases.

Elizabeth in favour of the Flemings a legitimate one, and that of France and her allies in favour of the Greek people"*.

Usual justification of the intervention on behalf of the Greeks that it was required for the interests of humanity.

310. The armed interposition of England, France, and Russia in 1829 in favour of the Greek insurgents against the Turkish Government (to which Count Mamiani refers in the last part of the passage just cited from him), is commonly justified on the ground that the Intervention of Foreign Powers was necessary in order "to stay the effusion of blood" caused by protracted and desolating civil warfare; that it was required by reason of the peculiarly cruel manner in which the war was carried on by the Turks; and, generally, that it was an intervention justifiable on behalf of the interests of humanity†.

* See Mr. John Stuart Mill's paper in Fraser, Dec. 1859, partly cited in the appendix to Mamiani (p. 359, Acton's translation), and referred to in a preceding note. He argues strongly that unless Despotic States agree to acknowledge the doctrine of non-intervention, it ought not to be binding upon Free States. He says that "The doctrine of Non-intervention, to be a legitimate principle of morality, must be accepted by *all* governments. The despots must consent to be bound by it, as well as the Free States. Unless they do so, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong, but the right must not help the right."

This is to a great extent true; but in using the epithets "Right" and "Wrong" we must remember that International Law, by recognizing all *de facto* governments as *de jure* governments, by renouncing all disquisitions as to the relative merits of monarchy, aristocracy, democracy, and their compounds, renounces also this classification of wrong sides and right sides according to anti-popular or popular tendencies.

† See Wheaton, 'Elements,' t. i. p. 87; Kent, vol. i. Comment. p. 25; 1 Phillimore, 441, 444. This was one of the three

311. This last is a justification which commends itself to our feelings, but (as Count Mamiani has shown) will not bear the test of reasoning. Chancellor Kent, although he is willing to admit it in this case, accompanies his admission of it by observations which show how dangerous a precedent it may be rendered. He says

Perilous nature of this justification.

Kent's cautions respecting it.

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reasons actually given by the Intervening Powers. The other two were, 1st, that the interference of the Allies had been solicited by the Greeks; but it is obvious that a request by only one party could give no rights as Arbitrators; and 2ndly, the prevalence of Piracy in the Mediterranean caused by the war; but it was self-evident that England, Russia, and France, could have put down the Pirates without destroying the Sultan's Fleet.

The national Historian of the Greek Insurrection, Spiridion Tricoupi, boasts of the exceptional character of his countrymen's struggle for independence, and of the exceptional circumstances under which the great Christian Powers of Europe intervened, so as to make that struggle successful. He says that his nation undertook a war different from all other popular uprisings, inasmuch as it "Ἐπεχείρησεν ἐπιχείρημα δεινότερον καὶ ἐνδοξότερον ὅλων αὐτῶν τῶν ἐπιχειρημάτων· νὰ ἐξώσῃ διὰ τῶν ὅπλων ἐκ τῆς Ἑλλάδος μίαν ξένην καὶ ἀλλόθρησκον φυλήν, ἡ ὁποία διὰ τῶν ὅπλων τὴν ἠχ - λώτευσε πρὸ αἰώνων, καὶ τὴν ἐθεώρει μέχρι τέλους αἰχμάλωτόν της καὶ ὑπὸ τὴν μάχαιράν της."—Vol. i. p. 1.

"Τὰ ἀποτελέσματα τῆς Ἑλληνικῆς ἐπαναστάσεως ἐδείχθησαν γιγαντιαῖα καὶ καθ' ἄλλον τρόπον· διότι ἀνέτρεψαν τὰς πολυθρυλλήτους ἀρχὰς τῆς Ἱερᾶς Συμμαχίας, καταδικαζόυσης πᾶσαν πολιτικὴν μεταβολὴν ἐνεργουμένην δι' ἀποστασιῶν καὶ δι' ὅπλων, διότι ἐτάραξαν τὸ πολυθρύλλητον σύστημα τῆς ἰσορρόπίας, τὸ ὁποῖον περὶ πολλοῦ εἶχεν ἡ Εὐρωπαϊκὴ πολιτική, καὶ διότι, ἀνακαλέσαντα εἰς τὴν δόξαν καὶ εἰς τὴν πολιτικὴν ζωὴν ἓν ἔθνος, τὸ ὁποῖον ἐρρίφθη πρὸ αἰώνων εἰς τὸν τάφον τῆς ἀδοξίας καὶ τῆς δουλείας, συνέτρεξαν καὶ εἰς τὸ νὰ διαλύσωσι μίαν μεγάλην καὶ παλαιὰν αὐτοκρατορίαν γεννηθεῖσαν ἀνδρωθεῖσαν, γηράσασαν καὶ ἀποθνήσκουσαν ἀνεπιστήμονα ἀντικοινωνικὴν καὶ βάρβαρον."—*Ib.* p. 4. Intervention to compel the observance of the Laws of War will be spoken of in a subsequent chapter.

of this kind of right of interposition, that it "must depend upon the special circumstances of the case. It is not susceptible of precise limitations, and is extremely delicate in the application. It must be submitted to the guidance of eminent discretion, and controlled by the principles of justice and sound policy. It would clearly be a violation of the law of nations to invite subjects to revolt who were under actual obedience, however just their complaints; or to endeavour to produce discontents, violence, and rebellion in neighbouring states, and, under colour of a generous assistance, to consummate projects of ambition and dominion"*.

Stronger cautions by Phillimore.

312. Sir Robert Phillimore (all whose sympathies are evidently with the Greeks, and with the Statesmen who effected their liberation) says of the supposed right of Intervention in behalf of the interests of humanity, that "it may possibly arise from the necessity of Intervention by Foreign Powers in order to stay the effusion of blood caused by a protracted and desolating civil war in the bosom of another State. This ground of Intervention, urged on behalf of the general interests of humanity, has been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it.

"As an accessory to others, this ground may be defensible; but as a substantive and solitary justification of Intervention into the affairs of another country it can scarcely be admitted into the code of Inter-

* 1 Kent, Com. p. 25.

national Law, since it is manifestly open to abuses tending to the violation and destruction of the vital principles of that system of jurisprudence—such abuses as generated the several partitions of Poland, the great precedent so often quoted, and so often imitated by the violators of International Law"*.

General review of Principles.

313. If we now look back on what has been said as to Intervention in another State's internal polity, and if the various rules which have been propounded are tried by us (as they should be) by the test of general utility, as well as by the balance of authorities, we shall, I think, find that the following principles are deserving of adoption.

As a rule Intervention is unlawful.

As a general rule, all such Intervention is unjustifiable.

Exceptional cases stated and considered.

314. But Intervention may be justifiable, and even a duty, in certain exceptional cases. These are :—

1. Where we intervene to check intervention.

1st. Where some other foreign power has intervened already, so that our purpose is not to introduce but to check Intervention.

2. Where our own State is menaced with actual hostility by the party against which we intervene.

315. 2ndly. Where the rulers of the State, with the affairs of which we intervene, are plainly and unmistakably acting in such a manner as to menace other States with actual hostility.

3. Where we intervene in aid of a grossly oppressed race, to whom its oppressors have refused all community in the benefits of government.

316. 3rdly. Where we intervene in behalf of a grievously oppressed people, which has never amalgamated with its oppressors as one nation, and which its oppressors have systematically treated as an alien race, subject to the same imperial authority, but in other respects distinct, the distinction being the dis-

* 1 Phillimore, 441.

tinction between privileged and burdened, between honoured and degraded, between fully protected and ill protected by law in primordial rights of security for person and property—and the distinction being hereditary, permanent, and practical.

Extreme caution needed as to this class of exception.

317. And even when a case appears to fall within this third class of exceptions, we must scrutinize it very carefully, before we admit it to that character; and great care must be taken lest there be a violation of the principles of Rights of Property, of Dominion, or of Empire, whether acquired by compact or by Prescription. The inherent sanctity of these rights, and the importance of respecting them for the sake of the interest of general Utility, have been set forth in preceding parts of this work *.

Requisites for a case to come within it.

318. Before we approve of Intervention in behalf of an oppressed subject race, it ought to be clear that the non-amalgamation of the two races has been due entirely to the haughty injustice of the dominant race, and that no fair hope of equal laws and equal franchises has been held out to the subjugated and down-trodden nation. Unless these limitations to the exception are strictly attended to, interventions in behalf of what it is now common to term oppressed nationalities are likely to prove the sources of as much unjust war and misery to mankind, as have ever been brought about by interventions in behalf of what used to be termed the Right Divine of Kings, and of the sacred cause of Legitimate Government †.

* See p. 252 *et seq.*, *suprà*.

† The subject of the general unlawfulness of the interference by one State with the form of

An additional exceptional case.

319. One more exception to the general doctrine of Non-Intervention may, I think, be fairly added. It is where the King, or dominant party of a nation keeps up, in defiance of the State's fundamental Laws, a mercenary army of regular troops, especially if carefully organized and officered by men who are of creed, of politics, and of feelings alien from those held by the great majority of the population, and where, by this being done, all effective manifestations of the popular will, and the formation of a truly national force are rendered utterly impossible*. When a King or a faction does this, and systematically tramples on a people's constitutional rights, relying on the support of the hireling army, in such a case a patriot of the nation and a foreign ruler are fully justified, the one in seeking, and the other in affording temporary armed intervention, so as to enable the national party to rise, and to organize their strength, without the imminent peril of being instantly crushed by the trained instruments of arbitrary power. Under these circumstances, the employment of such a mercenary army as I have described, by the King or dominant

Intervention justifiable if against a native tyranny upheld by foreign arms, or by a mercenary force alien in important respects from the bulk of the nation.

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government and the internal polity with another is closely connected with the topics which have been discussed *suprà* (chap. vi. pp. 99–107, and notes), as to every government *de facto* being a government *de jure* for international purposes. See also the same chapter, pp. 117–124, as to the influences exercised, and attempted to be exercised on European States by the Pentarchy, and by the Holy Alliance; and also as to the American Monroe doctrine, and as to the intervention of the French Emperor Napoleon III. in the internal affairs of Mexico.

* See Mamiani, p. 124; and Mill, as cited in appendix to Mamiani, p. 359.

faction, is equivalent to having called in foreign forces on the King or dominant faction's side. Counter-Intervention on the national side becomes then just and laudable. But the foreigner who so intervenes must be strictly cautious not to impose measures of his own on the nation which he comes to liberate; and he must allow that nation to use its own restored freedom of will in determining its own future Polity. Such was the nature of what we truly term the Glorious Revolution of 1688 *.

Interference of William of Orange in English affairs, and our "glorious" Revolution of 1688.

320. It has sometimes been attempted to justify wars of intervention on the ground that the intervening State had bound itself by treaty to uphold a particular dynasty, or a particular form of government in the State which is the subject of its intervention. But this only opens the question whether such contracts to interfere with the internal affairs of another nation are not in themselves contrary to sound moral principles, and to those cardinal rules of International Law, which make a State's right to self-government an essential element of its existence as a Sovereign State. There can be no doubt as to how this question should be answered. A treaty-obligation of such a kind is wrong in itself, and cannot generate any right. As General Halleck has well

As to treaty obligations to intervene.

Such Treaties are wrong in themselves.

* See again Mackintosh, 'Review of the Causes of the Revolution of 1688,' ch. ix.

I have not thought it necessary to allude to the old discussions as to a State's right to interfere by arms in the internal government of another State on account of Religion. No such claim is now ever heard of, unless when based on special treaty, and even then its validity is regarded as very doubtful.

stated the case, if such interference is in itself unlawful, no previously existing stipulation can make it lawful. "A contract against public morals has no binding force; and there is more merit in its breach than in its observance"*.

Other cases of Conflict of Rights.

321. Passing away from the subject of Intervention in the classes of cases which are usually before the mind when that phrase is used, we will proceed to consider certain other cases, in which the Rights of one State may lawfully require acts to be done, which acts may limit or impair the Rights of another State. And herein we will take first the class of conflicts of Right which arise when a State considers itself bound to require satisfaction for wrongs done to members of its community while commorant in a foreign country.

Claims of a State for redress for wrongs done to its members while abroad.

322. This subject has already been alluded to in the last chapter. We have seen that it is a State's right and duty to protect its members wherever they may be†. We have also seen that every State is

* P. 86.

† See p. 156, *suprà*, and the passage from Bluntschli cited in the note at p. 157.

Besides the general obligation incumbent upon all States to respect the general duty and right of every State to protect its citizens wherever they may be, a State which, either expressly or by the implication arising from long sufferance, invites the residence of strangers within its territories, comes under an obligation to provide reasonable protection for such resident strangers, and is answerable to the parent State of those residents if that obligation is broken. This is very forcibly and lucidly set forth in the speech of Sir Roundell Palmer (now Lord Selborne) on the "Greek Massacre," which was delivered in the House of Commons on May 20, 1870, and is reported in Hansard, vol. cci. p. 1123. "With regard to all Englishmen travelling in a friendly State pre-

under a correlative duty to prevent its citizens from injuring other States; and that if a State fail to do this, it is in general bound to make reparation for such injuries*.

We have seen also that a State's right to Inde-

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tending to civilization, we have a right to look for the observance and the enforcement by that State of the principle which is briefly stated by Chancellor Kent, in his 'Commentaries on Public Law,' where he says 'that when foreigners are admitted into a State upon free and liberal terms, the public faith is pledged for their protection.' That does not, of course, mean that an exceptional protection, greater than that which well-constituted governments ordinarily extend, and ought to extend to their own citizens, is pledged to the citizens of foreign States; but it does mean that those foreigners who come within their limits have the public faith pledged to them for the protection of a *bonâ fide* settled government, capable of repressing violence, outrage, and crime, in that manner and in that degree in which human governments in civilized countries ordinarily are capable of discharging those functions. And it is manifest that if foreigners were not entitled to look for that protection, all possibility of respecting the independent territorial sovereignty of foreign States would be at an end, and every nation would be compelled to apply its own power for the protection of its own citizens in foreign countries."

* See p. 159, *suprà*. The reader of this chapter is especially requested to read the extracts there made from Sir A. Cockburn's Geneva judgment, and the quotations from Vattel and Halleck which are given in the text of that page and the subsequent pages.

With respect to what is said in the extract from Halleck at p. 162, about the act of an individual citizen becoming the act of his State if it approves and ratifies that act, reference may be made to the observations of American as well as of English Publicists on the case of the 'Caroline' ("The People *v.* M'Leod," Wendell's Reports, xxv. p. 596). It is discussed by Mr. Lawrence in his 'Commentaire,' t. iii. p. 432, by Mr. Wheaton in an essay referred to by Mr. Lawrence, and by General Halleck, p. 303 *et seq.*,

pendence gives it the exclusive right of providing its own system of government, and of administering justice within its own territories*.

One State's Right to Independence may conflict with another State's Right to Security.

323. It is this last-mentioned branch of a State's Right to Independence (a State's right to provide its own system of government, and to administer justice within its territories) that comes into conflict with those Rights of other States to Security, to which we have just adverted.

Forms which the Conflict may take.

324. This conflict may arise, 1st, from complications which are sometimes created when foreign residents receive gross ill-treatment; 2ndly, from complications which arise when individual members of a State commit injuries to foreign States.

Terms to be used.

325. In order to prevent verbiage, the State by which redress is sought will, in this chapter, be called "the Plaintiff State," and the State from which redress is sought will be called the "Defendant State."

Nature of complaint.

326. The complaint of the Plaintiff State, when it relates to wrong suffered abroad by its members, may be that the Defendant State, within whose territories such wrongs have been perpetuated, although it has laws and a system of legal process sufficient, if honestly administered, to give protection against such wrongs

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who cites other American authorities.

Reference as to the ruling principle on this subject may also be usefully made to the cases of Burun *v.* Denman, 2 Ex. R. 167, and Secretary of State in Council *v.* Rammachee Boye Sahaba, 13 Moore, P. C. 22.

* See *supra*, p. 163.

as those complained of, does not choose to administer them honestly in behalf of the injured foreigner.

Another Form.

327. Or the complaint may be that the Defendant State does not provide itself with a system of laws and process sufficient to give the needful protection.

Another Form.

328. Similarly, in cases where the complaint is based upon wrongs committed towards the Plaintiff State by members of the Defendant State, the charge may be that the Defendant State does not honestly put in force the laws which it possesses for the purpose of preventing, or giving redress for, such wrongs; or it may be charged that the Defendant State fails to provide itself with a system of laws and legal process, sufficient for the purpose of protecting neighbouring States (including the Plaintiff State) from wrongs done by members of the Defendant State.

Mixed Form.

329. The complaint may be, and often is, a mixed one, that the legal system of the Defendant State is internationally defective, and also a complaint that such legal system is not honestly enforced to the extent to which it might do good. This need not prevent the distinct grounds of complaint from being separately considered.

First head of Complaint.

330. Let us begin by dealing with the first head of the first class of cases that has been suggested: let us first take the case where the Plaintiff State complains that one of its members, while resident in a foreign State, has suffered grievous wrong without redress.

Nature of Antagonism.

Here the unquestionable general right of the Defendant State to Independence, and to exclusive juris-

diction within its own territory is antagonistic to the right claimed by the Plaintiff State to call it to account for the mode in which it conducts its internal administration, and administers its laws.

Importance of each Right.

331. This right of Independence is a very important right; and it is moreover one in respect of which powerful States are very prone to encroach upon weaker States. If a strong State were to be at liberty to employ its armed forces against its weaker neighbours whenever one of the strong State's citizens, who had a lawsuit abroad, got an unsatisfactory judgment, or whenever such citizen received, while within any such State, harm or annoyance, for which he could not punish the wrong-doer, the causes and the pretexts for wars of ambition and oppression would be very mischievously multiplied. At the same time, the right and duty of each State to secure fair protection for its members, wherever they may be, is, as we have seen, equally undeniable.

As a general rule justice is to be sought from the local tribunals.

332. The result is (special regard being had to true Utilitarian principles) the establishment and general recognition of the principle that a foreigner who is wronged must, as a rule, first seek redress from the municipal laws and courts of the State in which the wrong has been done to him.

Exceptional cases.

If justice is plainly denied to him there, or very unreasonably delayed, or if the administration of justice be so grossly corrupt, inefficient, or unfair as to make such application worse than useless, his own government may and ought to demand compensation in his behalf from the sovereign authorities of the offending nation.

"Although the presumption of law is clearly in favour of the decisions of the lawfully constituted tribunals of a State, yet if it is plain that justice has been administered partially and in a different manner to the foreigner than to the subject, the government of the injured party may, notwithstanding such decision, demand justice, and, if it be refused, resort to reprisals. Subjects must submit to the authority of the law, however great the injustice: but foreigners are under no such obligation; for their own State may by force compel the execution of justice in their behalf"*.

Need of caution in such cases.

333. But before such a step is taken, it ought to be perfectly clear that the private wrong, which it is thus sought to redress by public arms, was a very great and a very gross wrong. And the denial, or delay equivalent to denial of justice shown by the local tribunals ought to be equally manifest. Even in such a case there ought first to be a temperate and explicit statement of grievance, and a request for redress, made by the State of the injured individual to the sovereign power of the State in which the wrong has been done; and it is not till such sovereign power has refused inquiry and redress, or has resorted to a series of frivolous subterfuges, which amount to refusal, that forcible means for obtaining satisfaction are justifiable. When force is employed for such a purpose, it is never (in the first instance at least) general warfare, but the limited kind of warfare called *Reprisals*, which will be explained presently,

Force not to be employed until temperate demand and remonstrance have failed.

Kind of force that is first to be employed.

* Halleck, p. 298, and see the remarks of Bluntschli cited in note to p. 157, *supra*.

and which must not be excessive, having regard to the injury which prompts them.

General rule as stated in the English State-paper of 1753.

334. The general law on the subject is tersely and plainly set forth in the celebrated State-paper of Great Britain in reply to the King of Prussia in 1753, which has been so often cited. "The law of nations, founded upon justice, equity, and convenience, and the reason of the thing, and confirmed by long usage, does not allow of Reprisals, except in cases of violent injuries directed or supported by the State, and of justice absolutely denied *in re minimè dubiâ* by all the tribunals, and afterwards by the Prince."

Cases of Defective Municipal Law.

335. We have been considering chiefly the complaints, by one State against another, which arise when there is no inherent defect in the laws or system of legal process of the State within whose territories the wrong has been perpetrated, but where there is refusal or neglect to put such laws and system of process fairly in force. But a complaint of the State to which an injured person belongs may be based on somewhat varying circumstances. It may be impossible for the State within which the wrong has been done to provide, in the particular instance, protection and redress for the injured commorant foreigner; and this impossibility may be due to the insufficiency of the laws and legal process. In this case, the demand for redress made by the parent State of the injured individual involves a demand that the State, within whose territories the injury has been done, shall alter its laws or system of legal

process, or both. Cases of this kind so closely resemble in principle the class of complaints on which we are next to enter, that it will be easy to apply to them most of the results of the discussion, which we are now about to institute, as to the cases in which a State claims redress from another State for wrongs committed by individuals belonging to the Defendant State. It is to be remembered that all persons resident within a State are bound by its laws, and amenable to its legal processes. The State is therefore responsible for them, whether they are of native or of foreign birth. For the purpose which we are considering, both classes are to be regarded as subjects, and as members of the State.

Defendant State's liability not unlimited.

336. I have already quoted some very valuable observations by Vattel, by General Halleck, and by Sir Alexander Cockburn, on the general principles of International Law, according to which it is the duty of a State to prevent its subjects from injuring other States, or to make reparation for such injuries if they have been committed. The same quotations point out that this duty is not absolute or unlimited. The obligation attaches only when the wrongful acts committed by individual subjects might have been prevented by their government, if the State had provided itself with reasonably sufficient laws and legal process, and if it had enforced those laws and employed that legal process with honest earnestness and reasonable vigilance*.

* See *suprà*, pp. 157–163. The reader of the present chapter is requested to refer to the passages there cited, and to

Difference between *Culpa* and active *Dolus.*

337. Complaints against States for the acts of their individual members are generally charges of Neglect. If the imputation be that the State encouraged or ratified the wrongful acts of its members, the charge becomes one of direct State-hostility, and it assumes a simpler though a sterner character*.

Of *Culpa* tainted by *Dolus.*

338. There is another distinction, which must not be passed over, though it applies rather to the *extent* of the liability incurred by the peccant State, than to the existence of "*Peccatum*" and liability—rather to the amount of damages than to the cause of action. It is the distinction between a case where the peccant State's omission to use a proper amount of care lest its subjects should injure another State is caused by ill-will on the part of the peccant State towards the injured State, and a case where there is no taint of malice. To employ the technical language of Roman law, there is an important distinction between a case where there is *dolus* as well as *culpa*, and a case where there is *culpa* only†.

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take them as incorporated in this chapter.

* See as to this the case of the 'Caroline' (People *v.* M'Leod), 25 Wendell Rep. 483, commented on by General Halleck, p. 303 of his work; Buron *v.* Denman, 2 Ex. R. 167. These have already been referred to in this chapter, *suprà*, p. 308.

† In Roman-Law language, "*Dolus*" or "*Dolus Malus*," when used generically, signifies "*malice*" or "*criminal design.*"

"*Culpa* (which generally, though not always, is opposed to *dolus*) has three significations. 1°. Taken with its large signification, *culpa* is equivalent to the English *guilt*. 2°. Taken with its narrower signification, it denotes generally the ground of imputation. 3°. Taken with its narrowest signification, it denotes crimi-

What negligence is actionable?

339. The main practical matter for consideration is, whether we can fix any, and what, principles as to the nature and the amount of such negligence on the part of one State towards another, in not controlling its

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nal knowledge *short of criminal design*, or negligence. It therefore excludes and is opposed to *dolus*" (Austin, vol. ii. p. 1092, note). It is in this last-mentioned sense, that of *negligence* without actual malice, that the word "culpa" is used in the discussions to which we are now referring.

There is an essential difference between *dolus* and *culpa*, although the phenomena of very heinous *culpa* sometimes so closely resemble those of dishonest intention that they are undistinguishable by a court of law. This is all that is meant by certain passages in the 'Digest,' which seem to make *culpa* and *dolus* identical; as, for instance, the passage in Digest, 44. 7. 1. 5. "Magnam negligentiam placuit in doli crimen cadere." A sure proof that Roman Law observed keenly the difference between them is found in the fact, that the Law held a covenant valid which relieved from the liability of making good such losses as were caused by *culpa* however gross; but a covenant was held invalid as *contra bonos mores*, which purported to give a similar immunity when the losses were occasioned by *dolus* (see Poste's Gaius, p. 382, and Professor Goudsmidt on the Pandects (De Tracy Gould's translation).

When an actionable injury has been done to one party through the negligence of another, the measure of damages is much ampler if there has been *dolus* mixed with the *culpa*, than if there has been mere *culpa* without *dolus*. If I were to enter here on the details of the complicated and much controverted law as to measure of damages, I should be obliged to consume an amount of space and of my readers' time inconsistent with the general scope of this book. I will refer those who wish minute practical information on the subject to Sedgwick on Damages, as edited by Maine; to the German civilians Hasse and Hænel, who are quoted by Sedgwick; to the very valuable commentary on the Digest xix. tit. 1. 13, by Pothier, contained in his work on Contracts, vol. i. p. 90, Evans's translation; to 1 Phillimore, International Law, p. 68; to the notes to

members from injuring that other State, as will authorize the injured State, according to International Law, in demanding redress from the State of the wrongdoers. This subject has acquired great interest by reason of occurrences in very recent history. The most important of these occurrences has been the International Arbitration held at Geneva in 1873, to adjudicate on the claims of the United States against Great Britain for alleged negligence in suffering ships of war to be built, and equipped, and armed in British territories, which were designed to cruise against the commercial marine of the United States, and which did, in fact, commit grievous devastation. Many of the matters which were debated in that Arbitration had special regard to certain rights and liabilities and usages connected with a condition of warfare, which would be out of place in this chapter. But there was large and learned discussion of the general topics of, first, a State's duty not to neglect to provide itself with laws, and a system of process, by which it may control those within its territory from injuring other States, and, secondly, its duty to enforce those laws and process with honesty, vigilance, and vigour.

The Alabama case.

340. The Award made in the Geneva Arbitration

Smith's Leading Cases, vol. ii. p. 430 (4th edition); to the "Argument of the United States" in the Geneva Arbitration, p. 212 *et seq.* of the Report published by the American Government; to Sir Roundell Palmer's Argument as to Interest in the course of the same Arbitration (Blue Book, No. 1, 1873, p. 353); and an American Treatise, there quoted, by Messrs. Shearman and Redfield.

The Geneva Arbitration. Extent of its value as an authority.

will, perhaps, not be regarded as a generally applicable authority. It is (to use Austin's language) too much "implicated with the peculiarities of the particular case"—especially with the fact that the Arbitrators were bound to follow and to obey three particular rules or canons, promulgated at the time of submission to reference, as if those rules had existed and had been recognized by both parties to the dispute at the time when the events occurred out of which the dispute originated. The circumstance is also to be remembered, that the Award was not unanimous; though this would go rather against the weight of its authority, if applicable to other cases, than against its applicability. Still the eminence of the Arbitrators, and the great amount of historical and jural erudition, of statesmanship, and of strong practical sagacity displayed in many portions of the judgments delivered in the course of that reference by the several Arbitrators, are such as to command our respectful attention to their doctrines relative to many important points of generally recognized International Law. The Records of the Geneva Arbitration contain many expositions of such doctrines by the Bench, besides many valuable and suggestive arguments by the respective advocates. The fact that the opinions of the Arbitrators differ materially one from another makes the function of commenting on them less presumptuous than it otherwise would be.

Reference to Roman Law.

341. The authority of the Roman Law was much appealed to; and analogies were drawn between the liability of one member of the Commonwealth of States

to another State for negligence, and the liability of one member to another member of the same State for negligence—this last being a topic so very copiously dealt with by the old Roman Jurisconsults, as well as by their commentators and their imitators among the lawyers and lawgivers of modern times. It was, indeed, quite necessary to enter into those subjects at Geneva; and I must be permitted to treat of them in these pages with more minuteness than I should generally consider to be allowable as to legal details, in a treatise which is not exclusively designed for forensic practitioners*.

Faulty negligence according to Roman Law.

342. According to Roman Jurisprudence, every one who was engaged with another in some matter of Obligation, especially if resulting from an agreement or contract, or from any thing that was assimilated to an agreement or contract, was bound to take certain precautions, the neglect of which (whether resulting in an act or in an omission) was imputable as a Fault.

343. I am quoting in substance Goudsmidt's de-

* In drawing the sketch which follows in the text, of Roman and of modern law generally as to the liability of citizen to citizen for negligence, I have chiefly made use of Poste's Gaius, p. 388 to p. 397; of Ayliffe as cited in the note to "The Case of the United States," Geneva Arbitration, Blue Book, No. 2, 1872, p. 41; and of the text of that part of the "American Case," pp. 41, 42; also of the authorities cited in Sir A. Cockburn's judgment, Blue Book, N. America, No. 2, 1873, p. 32 *et seq.*); of the comments of the Chief Justice of England himself; and, above all, of the very valuable observations on "*Culpa, Diligentia, Custodiam præstare*," contained in the Treatise on the Pandects, by Dr. Goudsmidt, Professor of Jurisprudence in the University of Leipsic. This Treatise has been translated by Mr. De Tracy Gould.

scription of this part of Roman Law. Let us pause here, and call to mind that all members of the Commonwealth of States are under obligations to respect each other's right to Security and each other's right to Independence.

Quotation from Professor Goudsmidt.

I return to Goudsmidt, who proceeds to observe that "the measure of the care to be taken was not always the same; and it depended chiefly upon the nature of the legal relations between the parties, whether the faulty negligence committed was or was not legally imputable to its author. For this reason the Roman Law established in these cases two degrees of fault—the gross or serious fault, *culpa lata*, and the slight fault, *culpa levis*." Some writers add further gradations into *culpa latissima* on one hand, and into *culpa levissima* on the other; but the distinction into *culpa lata* and *culpa levis* is all that is practically important.

Poste as to Standard of Diligence.

344. As Mr. Poste remarks, "The terms 'Gross' and 'Slight,' like other quantitative terms, have no positive signification until we fix upon some unit of measurement or standard of comparison to which any given instance may be referred, and by which it may be measured"*. Two standards are frequently employed by the Roman Jurists:—first, the care bestowed on important affairs by a diligent and intelligent man of business; and, secondly, the amount of care which the individual, who is charged with neglect of another's interests, habitually bestows on his own interests. "Although there is no necessary antithesis

* Poste's Gaius, p. 395.

between these two standards, yet practically in Roman Law they serve to fix the meaning of gross and slight negligence." Gross negligence was the omission to take even that amount of care for another's interests which the party charged took of his own, though he might not be a model man of business. Slight negligence was the omission to take that amount of care which intelligent and vigilant men of business habitually took of business-matters in general.

345. There were some cases, chiefly connected with the bailment of property, in which, from the special relationship between the parties, a liability arose to be accountable for all loss or damage, whether caused by any negligence or not (*custodiam præstare*); but as there is nothing analogous to these cases in the dealings of one State with another, it is needless to enter into that subject here. *Custodiam præstare.*

346. For a like cause it is needless to enter here further into the subject of the restriction to liability for *culpa lata*. The cases in which the Roman Law allowed a man charged with neglect to excuse himself by showing that he had done as much for his neighbour as he did for himself, are in no respect analogous to any matters that are likely to arise for discussion in International Law*. Indeed modern Publicists, and *Culpa ata.*

* Professor Goudsmidt says of this limited liability, "This restriction of responsibility seems to me founded either on the fact that he who is subjected to it, and to it only, had been called to occupy himself with the affairs of others only by necessity, or that the relations established with another, instead of being casual and temporary, had formed a per-

Modern doctrines as to *Lata* and *Levis Culpa*.

the tribunals of England and the United States, have expressed their disapproval of the usage of the epithets "*lata*" and "*levis*" as to "*culpa*," with a view to determine whether the inculpated party is or is not legally responsible for it. The current opinion now is, that it is only material to ascertain the amount of diligence which ought to have been bestowed. A failure to bestow that amount is faulty negligence (*culpa*), for which the defaulter must answer; and there is no need to add mere words of vituperation*.

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manent character, so that it was supposable that the creditor had reckoned in advance only on the aptitude and capability which he had remarked in the debtor with reference to his own affairs."

* See the numerous extracts from Jural writers of the highest authority, which are collected in Sir A. Cockburn's judgment, pp. 32–34. See the English cases cited in the same judgment, p. 34; and the case (referred to in the American argument) of "Steamboat 'New World' and others *v.* King," decided by the U.S. Supreme Court in December Term, 1853, and reported in 16 Howard's Reports, p. 469. The reference given in the American argument is wrong. The material passages of this judgment will be found at pp. 474, 475. See also the recent very important case of Railway Company *v.* Lockwood, Wallace's Reports, Supreme Court, U. S., p. 357. The Court, near the close of its judgment (pp. 382, 383), comments on "the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence, which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits." * * * "In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of de-

347. As we have seen, the best practical standard of "amount of diligence" is the amount which a good man of business would give to the administration of his own affairs. But no hard-and-fast line can be drawn here. The standard may be in itself the proper standard; and if the conduct of the party in question cannot stand the test of that standard when properly applied, a cause of action is proved to exist. But it often may be questionable how the standard ought to be applied. As Sir A. Cockburn has said, "The application of that standard must depend on the circumstances of each individual case, and on the view which the judge may, in his conscience, form of how far the conduct of the individual complained of may or may not have been that which ordinary prudence and sense of duty would have prescribed. I entirely agree with what is said by the learned editors of Zachariæ's 'Droit Civil Français,' on Article 1137 of the French Code:—

Difficulty lies in the application of the standard.

Sir A. Cockburn's remarks on this.

"'L' article 1137 se résume en un Conseil aux

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grees of care, skill, and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damage to another obliges him, by whose fault it happens, to repair it.' Toullier, in his Commentary on the Code, regards this as a happy thought, and a return to the law of nature. *But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.*"

Juges de n'avoir ni trop de rigueur ni trop d'indulgence, et de ne demander au débiteur que les soins raisonnablement dus à la chose qu'il est chargé de conserver, ou de faire, soit à raison de sa nature, soit à raison des circonstances, variables à l'infini qui modifient son obligation pour la rendre ou plus large ou plus étroite.'

"What is here said by the learned editors of Zachariæ appears to me to afford the true criterion. It is for the judge to determine, according to the best of his judgment, with reference to the facts of the particular case, and with reference to the thing to be done or left undone, whether what has been done or left undone, as the case may be, has been what could reasonably and justly have been expected from a person of ordinary capacity and prudence in the affairs of life. More than this is not to be expected.

"I have cited these authorities because, in the absence of any reference to the question of diligence among writers on International Law, it seems to me that the principle that prevails as to men's conduct in the affairs of life may by analogy be well applied to the discharge of its duties by a Government. Applying this standard, one nation has a right to expect from another, in the fulfilment of its international obligations, the amount of diligence which may reasonably be expected from a well-regulated, wise, and conscientious Government, according to its institutions and its ordinary mode of conducting its affairs; but it has no right to expect more"*.

* Page 34 of Blue Book.

How the analogy of the liability of a "prudens Paterfamilias" is to be applied to dealings between Sovereign States.

348. Before we proceed to consider further how this analogy is to be employed in International Law, let us remember that we are considering a State's liability to another State for wrongs not ordered and committed as acts of State, and not subsequently adopted so as to become equivalent to acts of State. A State's liability for its acts of State is of course absolute and unlimited. But we are now considering a State's liability for acts committed within its territories by individuals, who (by the fact of their being within its territories) were amenable to its laws and subject to its Government. As we have seen, "The responsibility of a State for the acts of its subjects is not absolute and unlimited. The Government of a country can only be held responsible for breaches of International Law committed by its subjects when it can reasonably be expected to prevent them"*.

Views of the majority at Geneva as to the extent of a State's responsibility for acts of subjects.

349. The majority of the Geneva Arbitrators have held that this limitation as to "reasonableness" applies to questions of fact only—such as questions whether certain acts were or were not done, and questions such as whether so much deception was or was not practised by the individuals perpetrating those acts, as to beguile and baffle the local authorities, though exercising very great vigilance, and though armed with all possible preventive and punitive powers by their municipal laws, and by their systems of legal procedure and of government.

350. I venture, though with all due deference to that learned majority, to express a belief that they

* See p. 160, *suprà*.

The limitation of Reasonableness goes further.

narrow too much the extent to which the limitation of *Reasonableness* ought to apply, and that it is erroneous to make a State's liability unconditional when it has experienced difficulties in repressing international wrong-doers, not through defects in its substantive laws, but through the character of its institutions as to criminal procedure; and it is to be remembered that criminal procedure includes such matters as lawfulness of arrest of person or of detention of property on suspicion, as the requisites of admissible evidence, as the right to trial by jury, and as the powers of the jury at the trial*.

Difference between defects in Substantive Law and limitations of the power of the Executive as to Process.

351. If a State's substantive laws were defective, and did not recognize grave International offences as crimes, it would be quite just and proper for other States on receiving injury from the individual citizens of such a State, to refuse to allow that State to shelter itself under the excuse of the insufficiency of its municipal laws.

* "Every system of criminal law must be composed, *first*, of laws forbidding specified acts under specified punishment, and, *secondly*, of laws by which these general provisions may be applied to particular cases. The first of these divisions may be described as the law of crimes and punishments, the second as the law of criminal procedure. * * *

"The law of criminal procedure consists of four parts:—*first*, the preliminary proceedings, including the taking security by imprisonment or otherwise for the appearance at the trial of the suspected person, the collection of evidence against him (called in the French system the instruction of the process), and his formal accusation; *secondly*, the regulation of the trial; *thirdly*, the rules governing the evidence produced at the trial; and, *fourthly*, the infliction of punishment. These divisions are inherent in the subject, and must

Let us try here the suggested analogy of the *bonus ac diligens Paterfamilias*. Let us imagine the head of a household, who established as a principle in his household that it was not a wrong which he would trouble himself to prevent or punish, if any of the inmates, or even of the temporary lodgers in the house, plotted and prepared and carried on, while under his roof, nuisances to any of the neighbours. It may be said that this would amount to virtual authorization of injury. But if, instead of a positive declaration to this suggested effect, he were to draw up a list of rules of the house, specifying the acts which, and which alone, he would prevent or punish, and the list did not include offences against the neighbours, the injurious effect towards the neighbours would be much the same. In such case, if the neighbours complained, the "Paterfamilias" would not be listened to, if he tried to excuse himself by saying that the rules of his house did not forbid such conduct. The short reply would be either this, "Then you ought to take care that your rules *do* forbid it;" or they might rejoin, "We care nothing about your private rules and regulations; we mean to protect ourselves under the public law."

As to Substantive Law.

Analogy of the *Paterfamilias*.

There is no difference of opinion in the Geneva Judgments on this point. Sir A. Cockburn said:— "It is quite clear that the obligations of the neutral

Absence of positive law to protect neighbours is no sufficient excuse.

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exist in some form or other in every nation and under every conceivable system." (General View of the Criminal Law of England, by Fitz-James Stephen, p. 7.)

The requirements of International Law must be obeyed. Sir A. Cockburn's dictum.

State spring out of, and are determined by, the principles and rules of International Law, independently of the municipal law of the neutral. They would exist exactly the same, though the Neutral State had no municipal law to enable it to enforce the duties of neutrality on its subjects. It would obviously afford no answer on the part of a neutral government to a complaint of an infraction of neutrality, that its municipal law was insufficient to enable it to ensure the observance of neutrality by its subjects—the reason being that international law, not the municipal law of the particular country, gives the only measure of international rights and obligations."

Count Staempfli's.

352. Count Staempfli (the Arbitrator appointed by the Swiss Confederation), in his judicial statement of General Principles of law, pronounces that "the absence of all municipal laws, or the want of sufficient laws on the subject, does not in any way detract from the law of nations, either as regards international rights or obligations"*.

Difference as to Right of Foreign States to object to a State's system of Criminal Procedure.

353. I believe that the true International Law on the subject has been correctly explained in a very recent discussion in the British Parliament by the present Secretary of State for Foreign Affairs. On the 13th of July last, the attention of the House of Lords was called to the following passage in a despatch of the German Minister to the Minister for Foreign Affairs of the King of the Belgians, dated the 3rd of February last:—

"They are incontestable principles of International

* Blue Book, North America, 1. 1873, p. 3.

Law that a State ought not to permit its subjects to disturb the internal peace of another State, and is bound to take care by its laws that it is in a position to fulfil this international obligation."

The noble and learned Lord who brought the subject forward, appeared to deny that a Foreign State could ever have a right to claim more than the enforcement of actually existing municipal laws. Lord Derby, in his answer, at first commented as follows on the opening part of the paragraph in the German State-paper :—

Lord Derby on a State's International obligations in respect of its Substantive Laws.

"A State ought not to permit its subjects to disturb the internal peace of another State. Very well; but what is disturbing the internal peace of another State? If the proposition is put in this way, 'All acts committed by the subjects of one State which have a tendency, however indirect and remote, to cause disturbance in another State, ought to be forbidden,'—then it amounts to a claim so monstrous and unreasonable that one may safely affirm that it never has been put forward by European diplomacy, and that it probably never will be. To take an example :—The abolition of slavery in one country may have a strong tendency to disturb the internal peace of a slave-owning community in an adjoining country. A political revolution, in whatever sense it is made, tends, by the sympathy it creates, or by the alarm which it excites, to produce important changes beyond the frontier of the State in which it occurs. But no one has ever said that in altering its own institutions a State was bound to take into account the effect

which such change might have on its neighbours. That interpretation of the words must therefore be put aside as extravagant. But if we put an opposite construction upon them—a construction which they will equally well bear—and read them in this way, 'There are some acts, tending to disturb the internal peace of another State, which by International Law a State is bound on that ground to forbid'—if, I say, the claim is carried no further than that, it is a claim which, within certain limits more or less defined, I conceive that every civilized Government has in practice admitted." Lord Derby then added the following valuable remarks on a State's International obligations towards other States as to the sufficiency of its Substantive Laws:—

"The noble lord seemed to lay it down as an abstract and general proposition—and I did not understand him to admit exceptions to it—that each State is necessarily supreme in the making of its own municipal law, and that no other State has a right to call upon it to make alterations in that law. That doctrine no doubt represents the general rule; but if laid down unconditionally, it seems to me open to criticism, because it shuts you up to the conclusion that every State must be the sole judge for itself what its international duties are. Now that is equivalent to saying that there are, or soon will be, as many different systems of International Law as there are independent States; and that, again, is very much like saying that there is no such thing as International Law at all. It seems to me, speaking with great

deference, that if a State lies under recognized international obligations towards another State, it is no answer to a charge of non-fulfilment of those duties that they were not fulfilled because municipal law did not allow of their fulfilment. The State aggrieved might surely reply to that plea, 'What is that to us? If your law is defective you can mend it; but the badness of your municipal legislation does not lessen our rights or our claims as against you.' Once admit that no nation can be called upon to amend its internal laws, however defective, by any other nation, and you put an end to all international compacts. For, on that hypothesis, a State, wishing to free itself from an inconvenient obligation to another State, has nothing to do except to alter its own laws in such a manner as to make the fulfilment of that obligation impossible, and then, according to the theory, the obligation itself ceases. Surely that is very like saying that no State is ever to be bound to any thing; and then what are treaties worth?"

354. It may therefore be admitted that Foreign States may have the right to treat grave defects in the substantive criminal law of a particular State as wrongful, and to ignore excuses founded on such defective conditions of substantive municipal law. But there seems to be a very wide distinction when we come to the State's municipal law of criminal process. I have already explained how much is embraced under the phrase "Criminal Process," or "Criminal Procedure." If complaint is made against a State that some of its subjects have

done acts injurious to another State, and the inculpated State replies that, by reason of the nature of its constitution, and of its legal system, it could not prevent or punish the alleged wrongdoers, the Defendant State thereby sets up an answer, which ought not to be summarily got rid of by saying, "You are screening yourself under the faulty condition of your municipal law, and in international disputes such excuses are not to be listened to." Sir A. Cockburn has justly said that in such cases regard must be had to the preventive and punitive means which the inculpated government had at its disposal. He forcibly observes that, "when we come to the question of the means which by law should be placed at the disposal of the Government, difficulties of a very formidable character immediately present themselves.

Need of attending to nature and amount of preventive and punitive power possessed by the Government. Sir A. Cockburn's observations on this.

"The more despotic and unlimited the power of a Government, the more efficacious will be the means at its command for preventing acts which it is desired to prevent. Is this a reason, in a country where absolute and unlimited power is unknown, where every power is exercised in subordination to the law, and where, for any interference by the Government with the rights of person or property, redress may immediately be sought, for investing the Executive with an absolute and irresponsible power, at variance with the whole tenor and spirit of the national institutions, in order to protect a belligerent from the possibility of injury from a violation of neutrality * ?

The more despotic the Government, the more efficacious its means.

* Sir A. Cockburn was speaking with special reference to the Alabama claims; but the principle of his reasoning applies

355. "Again, a nation has a system of procedure which is in harmony with its institutions, and with which it is satisfied. According to that system, persons against whom the law is to be put in force cannot be subjected to be interrogated in order to establish their criminality. Proof must first be produced, from which, while it remains unanswered, a presumption of guilt arises, before they can be called upon for a defence. Because a different system might be more efficacious in enabling the Government to establish a case for confiscating a suspected vessel, is the legislature called upon to change the law because other nations become involved in War?

Sir A. Cockburn's remarks continued.

"Again, the government of a country has been carried on for years according to an established system of official routine. This system may be somewhat complicated, and may render the action of the Executive less speedy than it might otherwise be. But it is safe, and has been found to work sufficiently well in carrying on the affairs of the nation at home and abroad. Because a more rapid and a more direct action on the point to be reached might be obtained by a simplification of the official machinery, is a Government to be held guilty of negligence, because, not foreseeing what was about to happen, it had not altered its ministerial arrangements accordingly?

"A Government, in all matters involving legal consideration, is in the habit of consulting and acting

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to all conflicts between one State's right to Security and another State's right to Independence.

under the advice of lawyers specially appointed to advise it. The purpose is the laudable one of ensuring the perfect legality of the proceedings of the Government; but this advantage necessarily involves some loss of time, during which the action of the Executive is for the moment suspended. Is this practice inconsistent with the diligence required of a neutral Government? Honestly intending to do what was right, is it to be held responsible because a vessel equipped for war has taken advantage of such a delay, though, perhaps, in the particular instance accidentally prolonged?

The same. 356. "I can only answer these questions in the negative. I do so on the ground, as to some of them, that they are things which no Government could reasonably be asked to do,—as to all, that they were not such things as a Government of ordinary prudence and sagacity, carrying on its affairs in the usual way in which the affairs of Governments are carried on, could have foreseen the necessity of providing for.

The same. 357. "Passing from the law, and the means which the law should place at the disposal of a Government, to enable it to repress intended violations of neutrality on the part of its subjects, to the action of the Government in the use of such means, it seems to me that two things are incumbent on a Government:—

"1st. That it shall use due diligence to inform itself, by the use of the means at its disposal, whether a violation of the law is about to be committed; and

"2ndly. That, being satisfied of the fact, it shall

use due diligence in applying its means and power of prevention.

"These conditions honestly and *bonâ fide* satisfied, no Government, as it seems to me, can be held liable for the acts of its subjects; but such acts must be deemed to be beyond the reach of any control which it can reasonably be expected to exercise."

The contrary doctrine involves the universal institution of Despotism.

358. In truth the doctrine maintained by those whom Sir A. Cockburn, in this part of his judgment, is opposing, would, if admitted, involve the necessity of the universal establishment of Despotic Governments. Until a State had placed itself under a ruler armed with the greatest practicable amount of executive power, and free from every constitutional check whatever, it could not be said to have done all that was possible in order to ensure the prompt arrest and the speedy condemnation and punishment of individuals who had broken, or who seemed likely to break the requirements of International Law as to not injuring Foreign nations. Such a conclusion is really a *Reductio ad absurdum*, which demonstrates the unsoundness of the dogma virtually enounced by four of the Geneva Arbitrators—the doctrine that in inquiring whether a State is, or is not, chargeable with culpable fault or negligence for not having prevented certain acts by individuals, no regard whatever is to be paid to the system of Criminal process which, and which alone, is recognized and permitted by the fundamental institutions of that State. Of course, I do not mean to say that a State is to obtain international impunity, if its system of Criminal pro-

cess is so grossly defective, or if it is worked by such notoriously dishonest or inefficient functionaries, as to make proceedings before its tribunals mere costly and mischievous farces. To quote again from Sir Roundell Palmer's speech on the Greek Massacre*, a State is bound to have "a *bonâ fide* settled government, capable of repressing violence, outrage, and crime in that manner, and in that degree, in which human governments in civilized countries ordinarily are capable of discharging those functions." But a free constitutional State cannot be held bound to sacrifice for the convenience of a foreign government principles of the character and value, which Englishmen and their kinsmen in the United States of America ascribe to the principle of Trial by Jury, to the principle that men are not to be convicted except upon lawful evidence, and to the principle that officers of the executive government cannot defend themselves from liability for acts of force which they cannot prove to have been lawful, by merely showing that they were acting in obedience to their superiors in the executive department of the government of the State†.

* See *suprà*, p. 307, n.

† Professor Lieber's work on Civil Liberty and Self-Government (p. 91) deserves to be referred to for its exposition of the immense practical value of this maxim as a safeguard of Constitutional Freedom. Lieber had practical experience of the difference in this respect of living under a German monarchy, and of living in the Anglo-American Commonwealth. But this principle undoubtedly fetters materially the power of a government to prevent infractions of Law by arresting merely suspected offenders without risk to the officials who execute the arrest.

Liability of a State for verdicts of its Juries asserted by some Publicists.

359. Indeed the advocates of the doctrine that a State's responsibility for the acts of individuals is in no way affected by the limits which its constitution places on the arbitrary action of its executive officers, do not shrink from asserting that a State is responsible for the verdicts of its Juries in State Trials, when Foreign Governments are interested in the result of such proceedings. M. Bluntschli, for instance, not only requires that the substantive criminal laws of a State shall embrace all offences against foreign governments, but he maintains that the State, in order to escape international responsibility, must exercise an amount of interference with the formation and with the behaviour of its Juries, which would be regarded as intolerable in any country of ancient freedom*.

Bluntschli's doctrines on the subject.

* This eminent Jurist *apparently* recognizes the duty of a foreign government to acquiesce in the acquittal of a Defendant in a political trial; but he adds reservations and provisoes which give to his chapter on the subject a very different aspect. To prevent the possibility of misrepresentation, however unintentional, I quote the whole passage. It will be found at pp. 264, 265 of Laboulaye's translation, edition of 1875:—

"Lorsque les lois pénales d'un État ne permettent pas de fournir une satisfaction suffisante, la partie lésée peut rendre l'état directement responsable.

"Les crimes ou délits sont punis conformément aux lois pénales du pays où ils ont été commis. Le pouvoir exécutif de ce pays n'a pas dans la règle le droit de s'immiscer dans l'administration de la justice. Les tribunaux criminels ou correctionnels ordinaires devront donc connaître de tous les crimes ou délits qui constituent une infraction au droit international, à moins que les lois ne prescrivent une autre mode de procéder. Le gouvernement étranger ne peut pas exiger qu'on suspende en sa faveur le cours régulier de la justice, et il doit se déclarer satisfait, même si l'accusé est acquitté ou est condamné à une peine infé-

Inadmissible extremes.

360. We may consider that when a State is charged with actionable neglect, in not having provided itself

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rieure à celle qu'il estimait devoir être appliquée. Cependant on suppose toujours dans ce cas :—

"(*a*) Que les lois du pays sont en harmonie avec les principes du droit international, et punissent les particuliers qui violent le droit des gens ou amènent la guerre. Si la législation du pays ne contient pas de dispositions sur la matière, en d'autres termes, si elle ne reconnaît et ne respecte pas le droit international, les autres états auront pleinement le droit d'exiger que les lois du pays soient modifiées et mises en harmonie avec les principes internationaux. Note du Marquis de Moustier, ministre des affaires étrangères de France, du 10 décembre 1868, dans le conflit gréco-turc (Archiv, 3646):—'Un état ne saurait s'affranchir d'une obligation de droit des gens, par ce motif qu'elle n'aura pas été prévue par sa législation intérieure. En pareil cas, la voie est toute tracée ; le moyen de remédier au mal, c'est de combler la lacune en décrétant les mesures législatives nécessaires.' Ce remède n'est suffisant que pour l'avenir, non pour le passé.

"(*b*) L'état doit veiller à ce que les tribunaux criminels appliquent les lois destinées à protéger le droit international. *Le fait que l'accusé aura été libéré ou condamné à une peine légère, arrête toutes les poursuites qui pourraient être subséquemment dirigées contre celui-ci, mais ne dégage pas la responsabilité de l'état.* Il y aura connivence entre l'état et le coupable, si l'on constate qui les juges *ou les jurés* se sont laissé entrainer par la passion politique ou la haine de l'étranger. *L'administration de la justice est une des branches de l'administration de l'état, et ce dernier est responsable des actes de ses tribunaux.* Ne pas rendre la justice ou la rendre mal, c'est violer, dans les deux cas, les principes du droit international, et l'état peut être rendu responsable de cette violation. Les tribunaux doivent donc agir, dans les affaires de ce genre, avec les plus grandes précautions et la plus entière impartialité ; il sera prudent de faire en sorte que les tribunaux appelés à se prononcer offrent, par leur connaissance du droit international et l'honorabilité de leurs membres, des garanties toutes spéciales ; on devra tout au moins les rendre attentifs à la gravité de la mission qu'ils ont à remplir, les

with a system of Criminal Process adequate to prevent its individual subjects from injuring other States, there are two opposite extremes as to the methods of testing its conduct, neither of which is admissible.

Two inadmissible extremes.

361. (1) The complaining State has no right wholly to ignore the character and the details of the Defendant State's system of Process.

The extreme theory of ignoring a State's Law of Process.

362. (2) The Defendant State has no right to excuse itself summarily by reason of defaults in its criminal Process, if those defaults are gross, grievous, and easily remediable.

The opposite extreme of allowing a State to defend itself by the defects of its Law, however gross.

363. Still we are left in search of a standard of a State's "due diligence" in this respect; and here again we must have recourse to our old analogical line of argument, to be drawn from the conduct of the ideal *Paterfamilias* of the Romans*.

Necessary still to find a standard for judging whether a State has paid due diligence as to providing itself with a proper system of process.

364. We must, however, take care not to be misled by the wording of our analogical test. The use of the term *Paterfamilias* is apt to suggest the erroneous idea that the government of every civilized State has necessarily the ample power over all who are members or subjects of that State, which the old Roman head of a household possessed over all the other members of that household. This is a fallacy which we have already dealt with. It is probably

The word *Paterfamilias* may be deceptive.

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engager à s'entendre préalablement avec le pouvoir exécutif, et leur faire remarquer qu'ils peuvent compromettre leur patrie par une décision prise à la légère."—Bluntschli, p. 264.

* He is thus described in the 'Digest':—"Homo diligens et studiosus paterfamilias, cujus personam incredibile est in aliquo facile errasse."—Lib. xxii. Tit. 3. sec. 25.

with the design of avoiding this fallacious suggestion that modern Statesmen and Jurists, when they are applying these parts of Roman Law to International questions, translate *Paterfamilias* by the term "Man of business." This is, indeed, the proper way in which to think of the government of a State—to think of it as corresponding with the managing man, or the managing men of business, in a great firm. The managers have powers; but those whom they manage, and *for whom* they manage, have rights. It is the duty of the whole body to see that its managers possess all powers which are substantially and ordinarily necessary for the attainment of the purposes, and for the fulfilment of the duties, for which, and subject to which, the whole body exists. It is equally right and proper that the managers should have no powers beyond those limits.

Proper idea of the managing committee, which is analogous to the government of a State.

365. Following out the analogy as thus explained, we shall have no difficulty in concluding that the State ought to exercise "due diligence" in taking care that its managing men of business (*i.e.* its government) have reasonably sufficient means of procedure in their hands for preventing individual members of the State from injuring Foreign States. Still the question recurs, "What is the measure of that due diligence?"

Application of the analogy.

Recurring question about *Due* Diligence.

366. The analogy of Roman Law as to actionable neglect will teach us that the amount of diligence legally due from one party in behalf of another depends, in the first place, very much on the question whether the Obligation, which that diligence is to enforce, is an Obligation existing for the sole benefit of

One ingredient of the measure of Obligation is the Interest for the sake of which it exists.

the party who claims its enforcement, or whether it is an Obligation reciprocally beneficial to both parties *.

367. This last-mentioned case, that of an obligation reciprocally beneficial to both parties, appears to represent the obligation which one Civilized State is under with regard to other States, as to not permitting injuries to be inflicted on them by any of its subjects. It is for the good of all States that such an obligation should exist, and that it should be respected.

The International Obligation now considered is an obligation for reciprocal benefit.

368. It would seem then to follow that the amount of diligence which a State ought to use in providing its managers with sufficient legal process for this purpose is "Ordinary diligence"—that is to say, "the diligence which an attentive and intelligent man of business, under ordinary circumstances, habitually gives to his own affairs"†.

This would require "Ordinary Diligence" only.

369. This, then, and no more diligence is due, as a general rule, in this respect from one State towards another. But there may be exceptional circumstances which increase the amount of diligence due.

This is the general standard, subject, however, to exception.

370. The best and safest authorities respecting Roman Law, as it has been adopted and applied in modern times, teach us also that the amount of

Amount of Diligence due may be increased by the special.

* "When the Bailment is for the sole benefit of the Bailor, the law requires only slight negligence on the part of the Bailee." — Story, 'On Bailments,' sect. 23.

"When the Bailment is reciprocally beneficial to both parties, the law requires ordinary negligence on the part of the Bailee."—*Ib.*; and see Poste's 'Gaius.'

† This is the explanation which Goudsmidt gives of the ordinary "Diligentia diligentis patris-familias."

amount of damage to which our neighbours may otherwise be exposed.

diligence due may be increased by the amount of mischief to which our neighbours may be exposed, if we are not specially careful in the particular case *.

Limit of increased rate of diligence.

But neither authority nor reason go any further. The extent to which they raise the amount of diligence due from one State to another on the matters of which we are treating is as follows:—Whereas in ordinary cases the amount of diligence which a State's neighbours may claim from it in taking measures to prevent its individual subjects from harming them is coequal with the amount of diligence which a reasonably good man of business ordinarily bestows on the management of his affairs, still, if it should appear that in any particular case, or class of cases, a neighbouring State is likely to suffer specially grievous damage by the misconduct of such individual citizens, the State to which they belong is bound to take the same amount

* "What constitutes ordinary diligence may also be materially affected by the nature, the bulk, and the value of the articles. A man would not be expected to take the same care of a bag of oats as of a bag of gold, of a bale of cotton as of a box of diamonds or other jewelry, of a load of common wood as of a box of rare paintings."—Story, 'On Bailments,' sect. 15. "The bailee ought to proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part."—*Ib.*, and see sect. 186. But still this increased exigency of duty does not amount to an obligation to keep harmless at all hazards; it does not become a contract to insure, an agreement *custodiam præstare*. Cases as to the absolute liability of skilled workmen for hire are quite Ἀπροσδιόρυστοι.

The authorities in support of the increase of diligence in proportion to the increase of otherwise probable damage will be found collected in the American case of "Steamboat 'New World' and others *v.* King," reported in 16 Howard's Reports, U. S., p. 475.

of earnest diligence in preventing them, which reasonably good men of business bestow in the management of those affairs which are of very great importance to them. This is a test, of which it is impossible to define the details beforehand in theory; but it is a test which may without difficulty be applied in practice as circumstances arise to require it, provided that it is used with common sense and common honesty. It is in this respect like the test by which juries in capital cases are often advised to satisfy themselves whether the degree of certainty, which they feel about the prisoner's guilt, is or is not sufficient to make it their duty to convict him. They are told that they ought to feel the same amount of certainty which they think necessary before they take action in the very important affairs of their own lives. Apply then to a State the analogous test of whether it has been as diligent to provide itself in its neighbour's behalf with a sufficient system of criminal process as it is diligent in providing itself with safeguards against mischief in its own important affairs; and furthermore, bear in mind that the mere proof of an affirmative in answer to this interrogation would not be sufficient justification against complaints, if it appeared that the inculpated State was habitually and grossly careless and disorderly in the management of its own affairs. But if it appeared that the State in question was civilized, and was reasonably firm and orderly in its self-government, an answer in the affirmative would be sufficient. Cases may be imaginable, but they must be very rare, where a State is morally bound to uproot its funda-

mental institutions and to ignore its primary principles of civil liberty and self-government for the purpose of arming its executive with summary unconstitutional powers as to treating suspicion as equivalent to proof, as to punishing before hearing, and as to trying by the agency of tribunals which are to play their parts according to official promptings and in awe of State-coercion.

Mere proof of damage not enough.

371. And while we concede that the amount of diligence due from us may be affected by the amount of damage to which our neighbours are liable unless we take care in their behalf, we must be careful not to allow that mere suffering of damage is enough to sustain a claim for compensation. That damage must be shown to be connected with our conduct in breaking some international law; the connexion must be close and the consequence direct. Otherwise it is a case of *damnum sine injuriâ*. We are to remember the maxim that "Non videtur quis injuriam agere, qui jure suo utitur;" and assuredly a State is *primâ facie* in this position, when it claims the right, as an Independent State, to make and to administer its own laws. Unquestionably the other great maxim here intervenes, which binds both State and Individual "*sic utere tuo, ut non alienum lædas*"*. But in trying to enforce that maxim the burden of proof always lies on the complainant; and the proof of default of duty to-

Primâ facie, there is no *injuria* on the part of the State which makes and administers its own laws.

* In the recent case of "The Madras Railway Company *v.* The Zemindar of Carnetinagam," decided by the Judicial Committee of the Privy Council on July 3rd last, this maxim is appealed to as "expressing a principle recognized by the laws of all civilized countries."

wards the great commonwealth of States ought to be very clear indeed before the right, most essential of all rights for a State's existence, the right of independent self-government is impaired, or in any way put in peril.

372. Let us consider what a strong measure it is for one State to interfere with another as to its municipal laws and self-government. And let us remember that Foreign States may require a State to alter its laws on the same principles which justify them in asking compensation from it for damages which they have actually sustained. An instance of this kind has happened lately on the Continent of Europe. And our own history records several occurrences, some of them in very recent times, which have brought questions as to this class of conflicts of International Law into prominence, and into practical importance*.

Strong measure to require a State to alter its laws.

Instances of this having occurred.

* Modern writers, both historical and legal, have generally censured the obsequiousness with which the English Government placed a new act (7 Anne, c. 12) in our Statute-book about the privileges of ambassadors, in order to appease the wrath of the Czar Peter I., at treatment which his ambassador had received in this country. On the other hand, politicians of all classes cite with approbation the answer given by Lord Hawkesbury, our Secretary of State for Foreign Affairs in 1802, to the demands of the Emperor Napoleon I. (then First Consul, and with whom we then were at peace) which required in effect the extinction here of the liberty of the press. The State-paper of the British Government avowed that "His Majesty neither can nor will, in consequence of any representation or menace from a foreign power, make any concession which may be in the smallest degree dangerous to the liberty of the Press as secured by the Constitution of this country." At the same time the English Ministry offered to put the laws in force against the writers of whom the French Ruler complained. This was done in the

As to acts of Interference for the sake of self-preservation.

373. We come now to nearly the last class of cases that we have to deal with, to the class of cases in

trial of Peltier for a libel on the First Consul of France.

The report of this case in the 'State Trials,' vol. xxviii. p. 529, deserves careful perusal by the student of International as well as of English Law. The same may be said of the case of Rex *v.* Vint, Ross, and Parry, for a libel on the Emperor of Russia, which will be found in an earlier part of the same volume of the 'State Trials.' In this last-mentioned case the indictment in both counts charged (*inter alia*) "the danger of creating discord between our Lord the King and his subjects, and his Imperial Majesty [the Emperor Paul I.] and his subjects." The Attorney-General, in his opening, said, "I admit the right of free discussion, as it regards all subjects of importance to the interest or happiness of mankind, and that it is only the malevolent and useless excess which ought to be punished." On the other hand, the counsel for the defence (Erskine) stated, "Malicious mischief, whether it appears in printing or in any other human action, ought to be punished."

In the King *v.* Peltier, Lord Ellenborough, C. J., in summing up, stated (p. 617), "I lay it down as law that any publication which tends to degrade, revile, and defame persons in considerable stations of power and dignity in foreign countries may be taken to be and treated as a libel, and particularly when it has a tendency to interrupt pacific relations between the two countries. If the publication contains a plain and manifest incitement and persuasion addressed to others to assassinate and destroy the person of such magistrates, as the tendency of such a publication is to interrupt the harmony subsisting between two countries, the libel assumes a still more criminal complexion."

Afterwards (at p. 618) Lord Ellenborough repeats this doctrine, plainly basing the indictability of such publications on the fact of "the consequence of such publications being a *direct* tendency to interrupt and destroy the peace and amity between the two countries."

The attempt made in 1858 to assassinate the late Emperor Napoleon III. by a body of conspirators, some of whom resided in England, where also some of the implements for the intended crime were prepared, brought this subject forward under circumstances of very great excitement. Doubts were felt by

which one State's right of self-preservation may justify it in acts which would otherwise be violations of another State's right as to independence and security.

Phillimore's case of bands of foreigners using shelter of neighbouring State to carry on hostilities.

Sir R. Phillimore puts a hypothetical case of this kind thus (the principle can be easily applied to many other cases) :—"A Rebellion or a civil commotion, it may happen, agitates a nation; and while the authorities are engaged in repressing it, bands of rebels pass

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some persons "whether the English law [as it then stood] was sufficient to reach aliens conspiring here to obtain the death of another alien in a foreign country." (See Mr. Sidney Herbert's speech reported in Hansard, vol. cxlviii. p. 1067.) Others, who did not not doubt that such conduct came within the reach of the criminal law as a common misdemeanour, thought that it ought to be treated as an offence of more heinous character. The English Government (Lord Palmerston being Prime Minister) brought in a bill for this purpose; but a large part of the nation was so incensed by the tone of apparent menace used in France, that when the bill came on for a second reading, an amendment was carried, by which a majority of the House of Commons censured the conduct of the English Government with regard to despatches on the subject received from the French. This caused the resignation of Lord Palmerston's Ministry, and the abandonment of the Bill. A Frenchman, Dr. Bernard, was tried in England for having been accessory in England to the murder of one of the persons who were killed when the conspirators endeavoured to carry their project against the Emperor's life into execution in Paris; but he was acquitted by the jury; and several important questions of law, which would have been brought before the Judges in the event of his conviction, were never argued or decided.

Afterwards, when the excitement of the public in both countries was allayed, a clause was introduced in a Consolidation Statute (24 & 25 Vict. c. 100. 4) by which criminal actions or attempts of the kind are made severely punishable by our tribunals. See on this subject the recent speech of Lord Derby, quoted at p. 328 *suprà*.

the frontier, shelter themselves under the protection of the conterminous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels or feebleness of the executive, is unheeded, or at least the evil complained of is unredressed. In this state of things the invaded State is warranted by International Law in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require"*. General Halleck, who quotes this passage from Sir R. Phillimore, understands it as asserting that the injured State has, in such cases, a right of extra-territorial jurisdiction, by virtue of which it sends its forces across the frontier. Halleck denies the existence of such a right as a matter of extra-territorial jurisdiction; but he admits as fully as Phillimore that the injured State has a right to take the law into its own hands, and to ensure itself from further molestation†. General Halleck says, "Shall the State which is suffering from the piratical incursions organized in, and emanating from, a neighbouring State, do nothing in self-defence and for self-preservation? Must she wait till the invading force crosses her own borders before she can attack or destroy it? Not at all. If the neighbouring State, from the want either of the will or of the ability, neglects to prevent such excursions, or to sup-

Right of injured State to pursue such bands across the frontier.

General Halleck's comments on this.

* Vol. i. p. 213. † P. 95.

press such organizations, the threatened State may cross the frontier and attack or destroy the threatened danger. But the act is one of *hostility*, and she performs it in the exercise of her *belligerent rights*, not in the exercise of a pacific right of self-defence. It is not necessary that such act should be preceded by a declaration of war, nor indeed that it should be followed by a public and solemn war in form; nevertheless it is a belligerent act, justifiable perhaps by the circumstances of the case, and the culpable neglect of the other party; and as such it belongs to that class of hostile operations known in international jurisprudence as '*Imperfect War*.'"

Surely in such cases, when it is admitted on all hands that the injured State has a right to protect itself by extra-territorial operations, limited, however, to the dispersion of the aggressive bands, and to the destruction of their fortress or war-ship, it is a controversy rather of words than of substance to argue whether such self-protection is to be called an exercise of extra-territorial jurisdiction, or an exercise of a belligerent right of imperfect warfare. I incline to think that it is not the latter; that it is not to be classed with "Reprisals," as General Halleck seems to consider. When an injured State takes Reprisals, she takes them only to a limited amount, but she takes them from any property or person of the State which has been the instrument of the wrong done to her. Reprisals are not limited to action against particular persons, or a particular fortification, or a particular ship. In the case which we are considering, the

Nature of Reprisals.

operations of the self-protecting State are so limited. The right to institute them resembles most nearly the right recognized in the principle, if not in all systems of municipal law, the right to abate a nuisance.

Cases of action against unoffending States on the ground of Self-Preservation.

374. But there may be cases in which, on the ground of Self-Preservation, a State claims the right of sending its forces into the territory of another State, and taking possession of property there, not on account of any wrong which it has sustained from such other State, or from any members of that other State, but on account of serious injury which some third State is expected to commit by obtaining command of the property or territory in question, unless the menaced State is beforehand in taking occupation. I can best illustrate this by briefly stating the circumstances of the most remarkable case of the kind that is to be found in modern history; I mean the seizure of the Danish Fleet by the British in 1807.

England's action against Denmark in 1807.

375. In 1807 England and France were at war with each other; they were both at peace with Denmark. During the first half of 1807 there had been obstinate warfare raging between the armies of the French Emperor Napoleon I. and the armies of the Russian Emperor Alexander I., who was acting as an ally of the King of Prussia against the French. One effect of these military operations had been to collect very large French forces in the north of Germany; and in the summer of 1807 an entire French corps d'armée was within a few days march of the frontiers of Denmark. The Danes had in their harbours a large and powerful fleet, and immense maritime stores;

Political and military State of North Germany at that time.

but their military forces were very slight, and it was impossible for them to prevent the French from effecting a sudden march into Denmark and seizing the Danish fleet and arsenal and maritime stores, if the Emperor Napoleon should think fit to order such a measure. On the 8th of July the Emperors Alexander and Napoleon made peace by the treaty of Tilsit. That treaty had many secret articles, which were not fully known to the European public until some years afterwards; but the English Ministry at the time obtained private information as to the nature of their principal stipulations. Among those secret articles was an agreement between the two Emperors that Napoleon should be at liberty to take possession of the Danish fleet, and use it in his warfare against England. The English Ministry forthwith prepared with remarkable promptitude and secrecy a formidable armament of twenty-seven sail of the line with upwards of forty frigates, a very large number of bomb-vessels and gunboats, and upwards of 300 transports on board of which 27,000 land-troops were embarked. This fleet and army entered the Baltic, and proceeded towards Copenhagen; and then the first notice of the designs of England was given to the Danes by a British envoy requiring the Danish Government to deliver up temporarily the Danish fleet to the British Admiral, on the solemn assurance that it should be restored at a general peace or at the conclusion of the war between England and France. The English offered also to enter forthwith into an offensive and defensive alliance with Denmark. The Danish Go-

The naval resources and military weakness of Denmark.

The Peace of Tilsit—secret articles.

Scheme of the French Emperor to seize the Danish fleet and to use it against England.

English expedition to Copenhagen.

Temporary surrender of their fleet required of the Danes.

Danish refusal.

vernment returned an angry and indignant refusal, and made preparations to defend their capital, their port, and their arsenals. The English Admiral and General of the land forces issued a proclamation to the Danes, which declared that "the recent treaties of peace and changes of Government and territory had so far increased the influence of France on the continent as to render it impossible for Denmark to preserve its neutrality, if ever so much minded to do so, that it was necessary for England to take measures to prevent the arms of a neutral power being turned against her, and that England therefore judged it expedient to demand the temporary deposit of the Danish ships of the line in a port of the King of Great Britain and Ireland, and that, as became the duty which he owed to himself and his people, his Majesty's demand was supported by a powerful fleet and an army amply supplied with every thing necessary for an active and determined enterprise." The British Proclamation further declared, "We come to your shores not as enemies, but in self-defence, to prevent those who have so long disturbed the peace of Europe from compelling the force of your navy to be used against us. We ask deposit—we have not looked for capture: so far from it, the most solemn pledge has been offered to your Government, and it is hereby renewed, that, if our demand be acceded to, every ship of the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag."

The Danish Government replied by an order confiscating British vessels and property. Hostilities soon commenced; but the British force, skilfully conducted both by land and sea, was overwhelming. After suffering heavy loss, the Danes capitulated on the 7th of September; and under the capitulation the English took away seventeen Danish ships of the line, a large number of smaller war-ships, and an enormous quantity of naval stores of every description, amply sufficient for the equipment of a much larger fleet than the fleet then possessed by Denmark, and for the maintenance of active naval warfare by a strong maritime force for many years.

Hostilities between Danes and English.

The Danes capitulate, and surrender their fleet.

Napoleon and the other foreign enemies of England denounced loudly this expedition as a flagrant violation of the Law of Nations. It was also vehemently but vainly denounced by the Opposition in both the English Houses of Parliament. I subjoin part of the defence made for it by the Marquis of Wellesley, one of the ablest and most energetic of the statesmen by whom it was supported.

Charges against the British Government of breach of Law of Nations.

376. Lord Wellesley argued that Napoleon had the power and the purpose to seize the Danish fleet, that he had the means of forcing Denmark to cooperate with him in the employment of that fleet; and then Lord Wellesley urged the House to consider what would have been the result of our arch-enemy acquiring this powerful marine as an instrument of attack against us. He showed also how the French possession of the Swedish fleet would speedily have followed, and how the whole floating strength of the North would

Lord Wellesley's justification of the enterprise.

have been under the control of our enemy. It would have been no trifling accession: forty sail of the line would have been placed in a commanding situation for the attack of the vulnerable parts of Ireland, and for a descent upon the coasts of England or Scotland; and in opposition to this formidable navy, the Admiralty could not have assigned any competent force without weakening our stations in the Mediterranean, in the Atlantic, and the Indian Seas, at a time when it was necessary to maintain our superiority in all these stations. Such being the character and power of the enemy, and such the condition of Denmark, "Is it possible," asked Lord Wellesley, "that any one of your Lordships can assert that the danger is not imminent? The case of danger, made out even in the imperfect manner I have stated it, is so great, that it concerns the very existence of the country as an independent power. Had Ministers not acted as they had done, they would have fatally abandoned their highest duties; and I hope in God, that if ever similar circumstances should occur, the same wisdom will be found at the helm, to conduct the vessel of the State in security amid the shoals and rocks that threatened its destruction.

"The moment was precious: a few weeks, perhaps the progress of a single week, would have rendered the attempt unsuccessful, and we should have been exposed to all the dreadful consequences I have detailed. Addressing a British audience, I can scarcely justify arguing the subject: the peril to which the nation was liable called up every sentiment

of affection to our constitution, to our liberties, and our laws, and in terms mandatory and irresistible dictated the course which must be pursued. The violence which has been attributed to this measure was unavoidable; every attempt at negotiation was unsuccessfully made; every offer of remuneration was insultingly rejected. It would have been useless to have extorted promises from a people wholly at the disposal of the enemy; nothing less than the resignation of the fleet was sufficient, and the means by which it was obtained were justified by every principle of truth, of equity, and honour. The great maxims of the law of nations are founded on the law of nature; and the law of security or self-preservation is, among these, the most important and sacred. It is a law equally to be obeyed by individuals and communities.

"The King, placed at the head of the great society subsisting in these islands, has no duty paramount to the protection of the people; and by the servants of the Crown this imperious duty has been, on this momentous occasion, vigilantly and ably discharged. The principle of the great law of nature and nations is clearly applicable to the case before your Lordships. *Here was an instrument of war within the grasp of our inveterate enemy: we interposed and seized it; and this act of energy and wisdom was to have the hard names of rapine and impiety ascribed to it!* To show that injury had been done to an innocent party in a transaction, was not to prove its iniquity. All war has the effect to involve in its

horrors the helpless and innocent; but it is not on that account necessarily unjust. Let any man say how war can be conducted without it. As neutral individuals may be sacrificed in the common calamity, so also may neutral nations. In cases of this kind the party committing the injury is frequently mistaken; it is often done, not by the ostensible instrument, but by the silent agent who, by previous misconduct, has exposed the sufferer to such an unfortunate situation. Are not such principles fairly referable to every part of this extraordinary case? If I have accurately stated the relative rights of countries as founded on the laws of nature, the government of Great Britain had only to put into exercise that law of self-preservation, that needed no learned and intricate disquisitions to justify it."

Authority of Grotius,

377. The authority of Grotius was appealed to in this debate to show that such acts may be justified by the law of Self-Preservation; and certainly the words of the Patriarch of the Law of Nations on this subject are very strong. They are to be found in the second chapter of his second book. He states generally, in section vi. 2, that "in extreme necessity the pristine right of using things revives, as if they had remained common; for in all laws, and thus in the law of ownership, there is an exception for the case of extreme necessity." He specifies several instances, and adds strong warning as to the caution to be used in the exercise of such an extreme right, and as to the obligation to make restitution when possible. He then proceeds to say, "Hence we may collect

how he who carries on a righteous war may lawfully seize on a place situate in a country with which he is not at war, namely, if there be danger, not imaginary but certain, that the enemy will seize that place, and thence do irreparable damage; and next, on condition that nothing be taken which is not necessary for this purpose of caution, for example, the mere custody of the place, leaving to the true owner the jurisdiction and revenues; finally, if it be done with the intention of restoring the custody to the true owner as soon as the necessity is over".

Double claims to Allegiance.

378. There is one more class of cases which seems to belong to the present part of our subject—to the consideration of Conflicts of International Rights. I mean the cases in which individual persons may be claimed by more than one State as its true subjects, and as bound to it by the ties of Allegiance. There is considerable difference between the municipal laws of various nations in this respect. By the common law of England all persons, of whatever parentage, born within the dominions of the English Crown, were natural-born British subjects; and by the operation of several statutes (the chief of which is as old the reign of Edward III.), all persons of British parentage born abroad were also British subjects. The United States retained a rule like that of the English Common law as to persons born within their territories; and they had rules like the English statutory law (though not equally comprehensive) as to the allegiance of the children of American fathers

Difference between Municipal Laws as to Allegiance. English Law.

American.

French.

born abroad. By the French law, as settled by the Code Napoleon, children born within France were French if their fathers were French, but aliens if their fathers were aliens—having, however, a right in such a case to acquire French citizenship by specified process and residence. Every child born abroad is French if its father was French. There are many more varieties in the laws of particular countries on this subject, as may be seen in the chapter in Mr. Lawrence's 'Commentaire sur Wheaton,' which treats of "Naturalisation et Expatriation"*, to which I would refer for detailed information on this subject.

Differences as to Right of Expatriation.

379. There is also a wide difference as to rights of Allegiance, caused by the very limited extent to which some countries recognize a citizen's right to expatriate himself, and to become a member of another political community. Until 1870 the maxim of the English law on this subject was that Allegiance is indelible—*Nemo potest ligientiam suam exuere.* A statute† passed in that year has made that maxim less absolute and unbending, and has provided processes by which British-born subjects, who are also according to the laws of some foreign State subjects of that State by parentage, may divest themselves of British allegiance. Provisions are also made for placing a similar release within the reach of persons born abroad of British parents, and also of persons who are British subjects, but who have been naturalized in some foreign State. I again refer to

Old laws of England.

Statutory change.

* Vol. iii. p. 184. † 33 Vict. c. 14.

Mr. Lawrence's work for detailed information as to both American and English law, and also as to the laws of the other chief nations of the commonwealth of civilized States on this matter.

CHAPTER X.

Of War, and generally of the Obligations and Rights arising out of Warfare.

Definition of "War," of "Belligerents."—Lawfulness of War.—Reference to Mackintosh; to the Solonian Maxim.—Principles of Conduct of War.—Montesquieu's Maxim.—Belligerent States' "true interest."—Justifiable Injuries to an Enemy must be such only as promote that Interest directly and substantially.—Importance of Test of Directness and Substantiality.—Jural Limitations as to Operatives, Operations, Instruments, and Objects in Warfare.—Harshness of Old Theories.—Growth of Secondary Laws of War.—Warfare not regarded by the Romans as a State of Lawless Violence.—War described by their Jurists as an Institution of Law.—Roman Laws of War.—Their Severity.—Milder Rules introduced.—Fallacy of certain extreme Opinions.—War is not licensed universal Violence.—War is not a mere Duel between Governments.—The Individuals who make up States must be affected by War.—Insidious Fallacies of Portalis and Talleyrand.—Question tried on Utilitarian Principles.—True Theory; as to Condition and Rights of War.—Pacific Means of obtaining redress to be tried before resort to War.—Meiationd.—Arbitrations.—Schemes of Universal Arbitration.—Of Imperfect War.—Reprisals, Retorsions.—As to Declarations of War and Manifestoes.—Rights of Alliance.

Definition of "War."

380. "War" means a hostile contest with arms between two or more States, or communities claiming sovereign rights*.

* I have taken this definition from Mr. Dudley Field ('Outlines of International Code,' p. 467), except that I

Of "Belligerents."

381. Every State or Community so engaged is termed a Belligerent.

Who may be Belligerents.

382. The Belligerent parties in an ordinary war are Independent States; but there may be an armed conflict between parties in the same State, amounting to War; and those parties may be Belligerents according to International Law*. In the present chapter, when "War" is spoken of, a war between Independent States is meant, unless the context points clearly to a different meaning.

Moral Lawfulness of War.

383. My limits as to space would not allow me to enter here into full discussion of the general question whether War can be justifiable; nor should I feel solicitous to do so, even if I had ampler opportunity. That there have almost always been wars, and that wars will again occur, are melancholy certainties, against which it is vain to shut our eyes. It is equally certain that a nation, which professed an intention never to engage in war, would, if its professions were believed, be very soon insulted, maltreated, and oppressed by other nations, and that such a pacific course on its part would most likely end in its dismemberment and national destruction.

I will refer to one authority only on this subject; and the passage of Mackintosh which I am about to quote is very valuable, as setting forth lucidly and

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use the term "States" instead of the term "Nations." The reasons for preferring the term "States" are given in the first chapter of this work.

* See Field, pp. 468, 469. I am not following him quite closely here.

briefly the principles on which, and which alone, War can ever be morally lawful.

Principles laid down by Mackintosh.

"The employment of force in the intercourse of reasonable beings is never lawful, but for the purpose of repelling or averting wrongful force. Human life cannot lawfully be destroyed, or assailed or endangered for any other object, than that of just defence. Such is the nature and such the boundary of legitimate self-defence in the case of individuals. Hence the right of the lawgiver to protect unoffending citizens by the adequate punishment of crimes; hence also the right of an independent State to take all measures necessary to her safety, if it be attacked or threatened from without; *provided always that reparation cannot otherwise be obtained, that there is a reasonable prospect of obtaining it by arms, and that the evils of the contest are not probably greater than the mischiefs of acquiescence in the wrong*, including on both sides of the deliberation the ordinary consequences of the example, as well as the immediate effects of the act. If reparation can otherwise be obtained, a nation has no necessary and therefore no just cause of war; if there be no probability of obtaining it by arms, a Government cannot, with justice to their own nation, embark it in war; and if the evils of resistance should appear, on the whole, greater than those of submission, wise rulers will consider an abstinence from a pernicious exercise of right as a sacred duty to their own subjects, and a debt which every people owes to the great Commonwealth of mankind, of which they and their enemies are alike

members. A war is just against the wrongdoer when reparation for wrong cannot otherwise be obtained; but it is then only conformable to all the principles of morality when it is not likely to expose the nation by whom it is levied to greater evils than it professes to avert, and when it does not inflict, on the nation which has done the wrong, sufferings altogether disproportioned to the extent of the injury. When the rulers of a nation are required to determine a question of peace or war, the bare justice of their case against the wrongdoer never can be the sole, and is not always the chief, matter on which they are morally bound to exercise a conscientious deliberation. Prudence in conducting the affairs of their subjects is in them a part of justice"*.

384. This passage from Mackintosh may be read in connexion with a maxim already set forth and commented on in this volume, a maxim which teaches that when one State inflicts serious injury upon another by a gross violation of International Law, the offence should be regarded as a treason against the great Commonwealth of civilized States, and that every State has a right, and is under an obligation, subject to certain limitations, to interpose forcibly against the wrongdoer. What are the limitations of that duty may be gathered from the sentences just copied from

Reference to the Solonian maxim.

* Mackintosh's collected Works, p. 430. Mackintosh was well acquainted with Cujacius. A passage from that great French Jurist will be found cited a few pages further on in this chapter, which teaches part of the doctrine contained in this quotation from Mackintosh.

Mackintosh, and from what has been written on the subject at the close of the second chapter of this book*.

General Principles as to conduct of War.

385. Enough for this occasion has been said as to the moral reasons for which it may be justifiable and necessary to engage in War. With regard to the general principles, on which war should be conducted, our primary authority may be found in the maxim which Montesquieu considers to be the natural foundation of International Law. That maxim has been already cited, and partly discussed†. The branch of it that bears on the present portion of our subject, declares that "Nations ought to do each other as little harm in war as possible, without prejudice to their own true interests."

Montesquieu's maxim.

"True interest" of a Belligerent State.

386. Now the "True Interest" of a State engaged in morally lawful warfare must be to obtain one or both of the undermentioned two objects:—

1st. Safeguard against a wrong;

2nd. Redress for a wrong.

Every deed of destruction or of damage to person or property, and, generally speaking, every act of harm whatever to an enemy, which does not *directly and substantially* tend to obtain one of the above-mentioned objects, is blamable under Montesquieu's

* See *suprà*, pp. 44–48, and notes.

† See p. 35, *suprà*. I repeat Montesquieu's words:—"Le droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible sans nuire à leurs véritables intérêts."—*De l'Esprit des Lois*, l. 1. c. 3.

maxim, and is contrary to the principles of International Law.

Such injuries to an enemy only lawful as directly and substantially promote the "true interest" of the Belligerent that inflicts them.

387. I wish to draw particular attention to the postulate that belligerent acts of harm must, in order to be internationally lawful, be acts that *directly* and *substantially* tend to effectuate one of the lawful purposes of the war. Without this limitation almost every kind of cruelty and destruction would be permissible. Any and every act, that causes damage of property or of person to any member of a belligerent State, may be said to weaken indirectly the State itself, and therefore to make it more easy for the other Belligerent to enforce the realization of its purposes in the war. But practically there is an important distinction, and one that is generally (though not always) to be drawn without much difficulty. I will first illustrate my meaning by instancing clear cases. Everybody sees at once that, if War is ever justifiable, it must be lawful in such War to attack, to rout, to destroy or capture your enemy's army or fleet, or to besiege, storm, and occupy his fortresses. Such acts tend substantially and directly to compel him to desist from the wrongful course which caused the war, and to make peace on terms which will give you fair compensation and reasonable security. But to shoot a quiet citizen in a perfectly submissive enemy's town, or to burn an inoffensive peasant's crops and homestead in a tranquil district, which had not been, and was not likely to be, the scene of any military operations, would be universally regarded as an act of wanton and lawless barbarity. It is of

Importance of test of directness and substantiality.

Illustration by extreme cases.

course possible that the citizen or the peasant might at some time join his country's forces, unless prevented by the shooting or the starvation inflicted on him. It is probable that, if spared, he might pay taxes at some time to his country, and so recruit its financial power. It is indisputable that a numerous population of citizens and peasants has much to do with a State's strength, and that whatever diminishes that population must *pro tanto* weaken the State and render it easier to conquer. But the influence of such deeds on the main course of the War is indirect and unsubstantial, and therefore cannot be justified by a condition of Belligerency.

Occasional difficulty of applying the test does not disprove its general soundness.

388. Unquestionably, cases may be easily imagined, and unfortunately cases do sometimes occur, in which it is hard to draw the line; but so in municipal law it is sometimes very hard to say whether the damage which a plaintiff proves is substantial and direct, or whether it is indirect and too vague or slight for the law to notice. Yet the general test of Directness and Substantiality is found to work reasonably well for all practical purposes in Municipal Jurisprudence; and so it will in International Jurisprudence, if it is carefully and honestly applied.

Further examination of Jural meaning of word "War."

389. It will now be useful to revert to the meaning of the word "War," as understood in International Jurisprudence. We have already accepted generally Mr. Dudley's Field's definition of "War," as signifying "a hostile contest with arms between two or more States, or communities claiming sovereign rights." It is necessary now to consider whether

any, and, if any, what kind of restraints are imposed by International Law on the Belligerents, as to the persons who are actually to wage "the hostile contest," as to the means of damage which they may employ, and as to the persons and things that are lawfully liable to undergo the direct violences of Warfare.

Harshness of Old Strict theories of War.

390. Most writers concur in stating that, by the old strict theory, "a state of War puts all the subjects of the one nation in a state of hostility with those of the other"*. And "as it was also a received rule that the persons and goods of my enemy belong to me if I can seize them, there was no end to the amount of suffering which might be inflicted on the innocent inhabitants of a country within the regular [*i.e.* without exceeding the lawful] operations of War"†.

Vattel‡ lays down broadly two general principles, one of which is that "*Tous les sujets de deux états, qui se font la guerre, sont ennemis.*" He proceeds to say that "Quand le Conducteur de l'État, le Souverain, déclare la guerre à un autre Souverain, on entend que la nation entière déclare la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société entière; et les nations n'ont affaire les unes aux autres qu'en corps, dans leur qualité de nations. Ces deux nations sont donc ennemies, et

* Kent, vol. i. p. 105.

† Woolsey, p. 199.

‡ Lib. iii. ch. v. sect. 70. Vattel gives many sage and humane reasons for the practical mitigation of the old war-theories in many important respects; but he fully admits them as primary rules.

tous les sujets de l'une sont ennemis de tous les sujets de l'autre."

Another principle which he enunciates is that "Dès que l'on a determiné exactement qui sont les ennemis, il est aisé de connaître quelles sont les choses appartenantes à l'ennemi (*res hostiles*). Nous avons fait voir que non seulement le Souverain avec qui on a la guerre, est ennemi, mais aussi sa nation entière, jusqu'aux femmes et aux enfans; tout ce qui appartient à cette nation, à l'État, au Souverain, aux sujets de tout âge et de tout sexe, tout cela, dis-je, est donc au nombre des choses appartenantes à l'ennemi"*.

Such theories, if fully worked out, would lead to monstrous consequences.

391. The inference from these principles, if fully worked out, would be, that Lord Bacon was mistaken in saying that "Wars are no massacres and confusions, but the highest trials of right." Indeed some Publicists have gone the length of maintaining that every thing in War is lawful against an enemy as such†. But these assertions are regarded as the

Extreme views adopted by a few Publicists.

* Lib. iii. ch. v. sect. 72.

† See Bynkershoek, as cited and confuted by Phillimore, vol. iii. p. 70. Mr. Wheaton, at the commencement of the second chapter, the 4th part of his 'Eléments du Droit International,' says, "En général on peut établir que les droits de la guerre relativement à l'ennemi doivent se mesurer par le but de la guerre. Pour arriver à ce but, et jusqu'à ce qu'il l'ait atteint, le belligérant a, strictement parlant, le droit d'employer tous les moyens qui sont en son pouvoir. Nous avons déjà vu que l'usage de l'ancien monde, et même l'opinion de quelques publicistes modernes, ne font pas de distinction quant aux moyens à employer pour cet effet; même des jurisconsultes comme Bynkershoek et Wolf, qui vivaient dans les pays les plus savants et les plus civilisés de l'Europe au commencement du dix-huitième siècle, soutiennent le large principe que tout

paradoxes of individuals; and (with the rare exceptions which they make) modern Publicists concur in recognizing a body of Secondary laws of War, which have grown up, and which have been adopted by all civilized nations, the effect of which is materially to qualify and limit those Primary principles of a condition of Belligerency, which have been first referred to.

Growth of Secondary Laws of War, mitigating the Primary.

392. Indeed, if we look back to the great nation of antiquity to which civilized mankind is so largely indebted for the foundations and the main rules of almost every department of Jurisprudence, we shall find that the Romans were far from regarding War as a condition of licensed promiscuous violence to be practised by all or any of the members of one Belligerent Community against all or any of the members of the other Belligerent Community. In their judgment the Declaration of hostilities between nation and nation was not a remitter of the human beings on either side, as against each other, to a supposed natural state of primitive savagery. On the contrary, War was considered by their great Jurists to be itself an Institution of Law, of the *Jus Gentium*, of the Law common to all civilized nations. The words of Hermogenianus

The Romans did not regard Warfare as a state of lawless violence.

War regarded by the Roman Jurists as an Institution of Law.

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ce qui est fait contre un ennemi est légitime, que cet ennemi peut être détruit quoique sans armes et sans défense; qu'on peut employer contre lui la fraude et même le poison; et qu'un droit illimité est acquis par le vainqueur sur sa personne et sur sa propriété. Tels n'étaient pas cependant le sentiment et la pratique de l'Europe éclairée à l'époque où ils écrivaient."

on this subject, as cited and adopted in the Digest*, are very remarkable and suggestive.

Hermogenianus cited.

393. Hermogenianus, speaking of the *Jus Gentium*, says, "Ex hoc jure gentium *introducta bella*, discretæ gentes, regna condita, dominia distincta, agris termini positi, ædificia collocata, commercium, emptiones, venditiones, locationes, conductiones, obligationes institutæ, exceptis quibusdam quæ à jure civili introducta sunt."

In considering this juridical account of the origin of War we must attend to the other institutions which Hermogenianus groups with War, as products of the *Jus Gentium*. The greater part of them have regard to complete and practical recognition of the Rights of Property, and to the facilitation of commercial intercourse and industrial cooperation among civilized mankind. The two which are placed with the Introduction of War at the head of the list, are of still more general importance. I mean the two institutions which were before the mind of the Roman Jurist when he wrote of "*Discretæ gentes* and *regna condita*."

Comment on this passage.

Comment continued.

394. In the words "*Regna condita*" we have that branch of International Law which deals with the amount and kind of self-government necessary for a political community in order that it may be a Sovereign State, and which also deals with its rights of Jurisdiction. The words "*Discretæ gentes*" do not merely mean the territorial or ethnological division of nations one from another, but they involve the deter-

* Book i. tit. 1, sect. 5.

mination and definition of a man's peculiar relations to the State of which he is a member—of the ties which bind him to his fatherland. As soon as there is a "*Discreta gens*" and a "*Conditum regnum*," there is a State, a Πόλις, a country, towards which arise the feelings and obligations of Allegiance, of Loyalty, of Patriotism.

If we bear this in mind, we shall better comprehend Hermogenianus when he says, "*Ex hoc jure gentium introducta Bella.*" The Roman Jurist is not speaking of all kinds of forcible strife and forcible seizure. He does not mean to say that fighting and slaughter and rapine did not exist in the world before the establishment of a general law of nations. The real import of this celebrated text is as follows:—When States had been formed, inasmuch as they acknowledged no common superior who should decide such differences as arose between them, the only possible mode for an injured State, which could not obtain redress by persuasion, was to seek it by War—not, however, by War waged in any manner and with any amount of ferocity, but by War carried on according to such rules as the general opinion and consent of civilized mankind should from time to time ordain—that is to say, according to *Jus Gentium*, understood as the Law common to all civilized nations. And it is also to be remembered that the great Roman Jurists, in the spirit of the Stoical Philosophy, regarded the *Jus Gentium* as emanating from, and almost identical with the *Jus Naturale*, notwithstanding the admix-

Real meaning of the text of the Digest.

ture of some baser elements*. When War as waged between civilized States is thus understood, the text of Hermogenianus is seen to be full of truth and significance. If, on the contrary, it should be taken to mean that human beings never quarrelled and fought before there was a *Jus Gentium*, it would be self-evident nonsense. But when rightly received it serves to impress deeply on our minds the important principle that War, as waged by civilized States, so far from being a condition of lawlessness, is in every respect subject to the requirements of Jurisprudence as to its inception, its conduct, and its termination†.

* See *suprà*, p. 12, and notes.

† I subjoin parts of the Commentary of Cujacius on this celebrated text. They are to be found in the 7th volume of his works, p. 28 *et seq.* They will serve not only to explain Hermogenianus, but also to show the opinions as to many of the most important laws of War held in the sixteenth century, as they were expounded by the great commentator who is the special glory of French Jurisprudence.

Cujacius says of the text of Hermogenianus (*inter alia*), that "In hac lege enumerantur multa alia introducta ex jure gentium, et primo loco *Bella*. Bella ergo justa et pia. Nihil enim bello injusto est à ratione naturali alienius * * * * * Ergo justa tantùm bella sunt juris gentium. Et recte Jugurtha apud Sallustium se ab jure gentium prohiberi ait, cùm populus Romanus prohiberet bellum gerere cum Hasdrubale [*lege* "Adherbale"] à quo Jugurtha sit lacessitus injuriâ, quâ de causâ Principes potissimum suscipiunt bella. Justa bella sunt, quibus repetimus res nobis ablatas, vel debitas, vel earum rerum nomine pignora, quæ alio nomine repetere aut repetita obtinere non possumus: quod non sit nobis cum iis, quibus bellum inferimus, communio legum. Et justa item sunt bella, quibus injurias et peccata admissa in Rempublicam, imperium aut rem nostram vindicamus et persequimur. Quod aliâ ratione perse-

Some observations have been made in an earlier part of this volume on the reasons which there are for believing that the Roman Laws of war, as they were practised and studied during the ages of Rome's contests with other nations for the mastery of the world, were much more copious and explicit than can now be gathered from the extant compilations of Roman Law, —compilations made from treatises written during or near to the age of the Antonines, when Rome had for centuries monopolized dominion over nearly all the civilized countries that were known to her, and when there was no longer any practical reason why her magistrates and lawyers should study and teach that "*præstabilem scientiam in fœderibus, pactionibus, conditionibus populorum, regum, exterarum nationum, in universo denique belli jure et pacis,*" which the statesmen and Jurisconsults of the Republic had learned and expounded*. We can, however, discern enough

Roman Laws of War.

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qui non possumus, atque ita cogimur manu ac viribus agere, quod non possumus jure judicioque civili. Nam ubi licet experiri jure civili, sanè non licet bello aut duello. Sed ubi non licet jure civili et judicio, et æquitas intervenit aliqua, sanè licet vi et armis. * * * *

"Sed et ut justa sint bella necesse est publico consensu decernere, vel imperio Principis, in quem omne jus populus contulit. * * *

"Verum non tantum justa bella esse oportet, quæ nos dicimus jus gentium introduxisse, sed etiam juste geri, non acerbè, non ad internecionem, non læsâ fide, si quæ datur interim, vel post finitum bellum, non ruptis fœderibus, induciis, pactionibus, non violatis legatis, non alio quam milite. * * * *

"Jure gentium non tantum captivi, sed etiam omnia quæ capimus ex hostibus nostra fiunt."

* See page 89, *suprà*, and note. I will cite here one

of the old Roman war-system to know that it repudiated license*, that it required that none should engage in battle except regularly enrolled soldiers†, that it forbade breach of faith towards an enemy, and the practice of treachery or assassination. But we have also proof that the Roman laws of War were in many matters harsh and cruel to an extent which modern civilization refuses to imitate. The conqueror had a right to take the lives of those whom he conquered, or, if he spared them, to make slaves of them. It was, indeed, customary to spare the lives of those who submitted without resistance; but this was regarded as a concession out of mercifulness, and not as a matter of right‡. The same dreadful doom of slavery might be inflicted on the whole population of a conquered district or town. And it was even part of the Roman

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passage out of many that might be added to the citation given there from Cicero's speech 'Pro Balbo,' to prove the existence and the copiousness of the Roman war-code. Cicero, in the De Officiis, iii. 29. 108, says that in respect of a "*Justus et legitimus hostis* [such as Carthage was to Rome] *et totum jus fetiale et multa sunt jura communia.*"

* Grotius (Prolegomena, 26) says, "Veteres Romani, ut Varro notabat, bella tardè et nulla licentiâ suscipiebant."

† See Cicero, De Officiis, xi. 36, 37, and the passage from Plutarch (Quæst. Rom. 39) cited in Mr. Holden's notes.

‡ See the passage in Cæsar, B. G. ii. 32: "Cæsar respondet Aduaticis se magis consuetudine suâ quàm merito eorum civitatem conservaturum, si prius quàm aries murum attigisset, se dedidissent." There is, on the other hand, express authority to show that the slaughter in cold blood of those who had previously been admitted to surrender, was a breach of the laws of War. See Sallust de Bell. Jugurth. c. 96.

law that commorant foreigners, who in time of peace had come to a country between which and their own country a war afterwards broke out, were liable to be seized and made slaves*. With respect to property, all the goods and chattels of any member of the population became liable to seizure by any member of the hostile community. The immovable property of the conquered passed to the conquering State; and the conquering State was also considered to acquire property over booty taken in military operations†.

Influences that have mitigated the old Rules of War.

395. I have already stated that it is not purposed to include in this volume a regular history of the progress of International Law. A general statement here will suffice, that many causes, different in their natures but concurrent in their effect, have materially mitigated the sternness of this old primitive war code. The diffusion of Christianity has been the most important of these causes; although it must not be forgotten that the prevalence of hostilities on account off differences in religious opinion among Christians has too often caused warfare to be waged with more ferocity and faithlessness than had been usually exhi-

* "In pace qui pervenerunt ad alteros, si bellum subitò exarsisset, eorum servi efficiuntur, apud quos jam hostes suo facto deprehenduntur." Dig. xlix. tit. xv. s. 12.

† "Res hostiles quoque occupantis fiunt. Belli tempore res, quæ hostium sunt, nullius esse finguntur, et cuique civium occupatio earum permittitur, præter res soli, quæ occupatæ ipsius populi belligerentis propriæ fiunt, sicut et præda collecta." Warnkoenig Inst. Jur. Rom. sect. 324, citing Digest, sect. 17. l. 2. 1. h. t. p. 5; sect. 7, p. 71; sect. D. ib. p. 13; D. 48. 13 (ad leg. Jul. Peculat.), pp. 2, 3; D. 49, 15 (de Captivis et Postlim.).

bited in merely secular strife, and thereby tended to embitter the general character of belligerency. Other civilizing influences have materially humanized European nations, and their descendants in the New World, during the last three centuries; and the softening process has extended to the usages of war. In some matters (and those of considerable importance) enlightened self-interest has aided in making statesmen and generals incline to merciful innovations. Many of these mitigations (probably all) were at first designed and regarded as personal indulgences and exceptional remissions of right. By degrees they grew to be so frequent as to be considered and expected as customary courtesies; and, as Sir R. Phillimore has observed*, that which has taken place so extensively in other departments of International Jurisprudence, is to be observed as to the laws of Warfare also. The practice and usage of nations is perpetually transplanting the concessions of Comity into the domain of Right. Hence has arisen what is sometimes termed a Secondary Code of the Laws of War. But before any particular State can be regarded as bound by any of these secondary or customary rules it must be proved to have assented, either expressly or by implication, to such rule.

Mitigations at first matters of Comity, become matters of Right.

Growth of Secondary Laws of War.

A State not bound by them unless it has assented to them.

396. We shall have to consider these topics in detail when we deal with the laws of War under separate heads, discussing them, first, as they affect the Belligerents themselves, and, secondly, as they affect Neutrals. For the present it is enough to state that

Two opposite extreme Theories to be avoided.

* Vol. iii. p. 72.

there are two extreme views as to the conduct of Warfare, each of which is fallacious. One of these is the theory of Bynkershoek and Wolff*, that War is a condition of licensed violence, in which all means, fair or foul, of injuring any enemy may be taken. I should not have thought it necessary to repeat a repudiation of this savagery, were it not for the contemptuous lawlessness which some Statesmen and some writers have lately avowed as to the obligation of Treaties†. They who can thus trample on the most ancient and sacred principle of faith between nation and nation, are not unlikely to show equal cynicism as to any other international restraint upon violence towards an enemy, if such violence seems likely to subserve their vindictiveness or their rapacity.

First Fallacy, that War is a remitter to general lawless violence.

The other and the opposite error is one far more plausible in appearance; and it is one which now finds favour with many well-meaning theorists, besides the politicians of the great military States, who advocate it out of more astute motives. I mean the doctrine that War is a relation between Government and Government only—not between people and people, or nation or nation, or between State and State, except so far as regards the actual executive rulers of the States and the professional military and naval fighting-men whom those executive rulers respectively employ. The other persons who make up each State have, according to this theory, nothing to do with the war. They are not mutual enemies as men, they are not such even as citizens; they only become such when

Second Fallacy, that War is a mere duel between Governments.

* See p. 368, *suprà*. † See *suprà*, p. 40 *et seq.*

they take position in the regularly organized forces of each State. According to this view a War is nothing more than a kind of duel, in which the Governments are to be looked on as the combatants, and their fleets and armies as the weapons employed in the conflict*.

Contradicted by the Fact that a State is a Moral Agent.

All this is diametrically contrary to the principles of Ethics and Jurisprudence already explained, according to which a State is to be regarded as a Moral Agent, being a Community of human beings, each of whom is a moral agent, and who by combining into a State acquire additionally the attribute of joint moral right and joint moral responsibility†. To quote again the words of Chancellor Kent, "States or bodies politic are to be considered as moral persons having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with

* M. Calvo (Le Droit International, tom. ii. p. 109) has well exposed this theory:— "C'est tomber dans l'extrême opposé que de soutenir, comme le fait Pinheiro-Ferreira, que la guerre n'a jamais lieu entre nations, mais seulement de gouvernement à gouvernement; et que l'on ne doit considérer comme parties belligérentes qu'un certain nombre d'individus associés aux projets de ceux qui ont engagé la lutte. C'est là en effet une distinction essentiellement illogique. En principe, il y a solidarité absolue entre le gouvernement et la nation; et de nos jours le droit public confond d'une manière indivisible l'Etat avec ceux dont il est l'organe et le représentant par une délégation plus on moins directe. En résumé, nous disons qu'à nos yeux les actes gouvernementaux réfléchissent nécessairement sur la nation tout entière, et qu'il serait aussi contraire à l'histoire qu'à la raison d'admettre que les guerres pussent ne pas traduire l'esprit national, c'est-à-dire l'esprit du peuple qui les fait."

† See *suprà*, p. 23.

him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life"*.

This theory is also contrary to sound Utilitarianism.

397. This doctrine is not more illogical than it is inexpedient, according to the true principle of having regard to the interest of all concerned. It is certainly very plausible, and much favour is naturally at first felt towards its advocates when they assert that they are advocating a limitation of Warfare, the effect of which would be to exempt absolutely the persons and the property of all private individuals from violence and spoliation. But a little reflection will point out to us that the recognition of such a system would infallibly lead to such an increase in the permanent military and naval establishments of every State, as would make the burdens of taxation, even in peace-time, worse than the evils caused by the occasional outbreak of hostilities conducted as has hitherto been customary. It is to be remembered that this suggested new scheme of War, while it offers to private individuals immunity from the sufferings caused by

It would establish the permanent maintenance of enormous military establishments.

* Kent's 'Commentaries,' vol. i. p. 3. The same great Jurist, at p. 66, expressly says, "Every man is, in judgment of law, a party to the acts of his own Government; and a war between the Governments of two nations is a war between all the individuals of the one, and all the individuals of which the other is composed. Government is the representative of the will of all the people, and acts for the whole society. This is the theory in all Governments; and the best writers on the law of nations concur in the doctrine that when the Sovereign of a State declares War against another Sovereign, it implies that the whole nation declares War, and that all the subjects of the one are enemies to all the subjects of the other."

hostilities, inevitably requires from them total abstinence from cooperation in the defence of their country. Trained troops cannot be extemporized; and this becomes more and more true in proportion to the more and more scientific and elaborate character which the art of destruction and the implements of destruction are now continually acquiring. A State's hopes of safety would depend on the amount of regularly disciplined forces and of costly war material which it constantly kept on foot. We must here consider, besides the financial oppressiveness of such a policy, the manifold mischief of withdrawing a large proportion of a country's population from productive employment, and of imbuing them with the habits of the professional soldier. Vattel pointed out these evils more than a century ago, as they then had begun to display themselves in Europe in consequence of the pride and ambition of the French Court, in the increase of the French standing armies, and in the necessity which was consequently imposed on other Continental Powers of maintaining troops in peace-time on a then unprecedented scale*. But

Mischief of overgrown permanent military establishments.

Vattel's comments on this.

* "Quelle charge pour un État! Autrefois, et sans remonter plus haut que le siècle dernier, on ne manquait guère de stipuler dans les traités, que l'on désarmerait de part et d'autre, qu'on licencierait les troupes. Si en pleine paix un prince voulait en entretenir un grand nombre sur pied, ses voisins prenaient leurs mesures, formait des ligues contre lui, et l'obligeaient à désarmer. Pourquoi cette coutume salutaire ne s'est elle pas conservée? Ces armées nombreuses, entretenues en tout temps, privent la terre de ses cultivateurs, arrêtent la population, et ne peuvent servir qu'à opprimer la liberté du peuple qui les nourrit." (Livre iii. ch. iii. sect. 50.)

where States in Vattel's time kept up soldiers by hundreds, they now maintain them by thousands; and if the proposed new system became general, the increase would be in myriads and in millions. States of small or of moderate resources would vainly engage in rivalry of armaments with powerful empires; and the ultimate effect would be, that the great military monarchies would wholly domineer over the rest of Europe. We should also bear in mind what a temptation to wars of ambition and aggrandizement must be created by the constant possession and contemplation of huge armies in perfect readiness for action, and naturally eager for opportunities of distinction:—

Such a system would give up the world to the great military monarchies.

> "How oft the sight
> Of means to do ill deeds makes ill deeds done!"

Let not sanguine Liberals suppose that the expected progress of Republicanism will put an end to warfare of this description. Those who study history and watch mankind know well that feelings of national vanity and vindictiveness and of adulation towards martial glory are by no means limited to Kings. They are to be found in "the fierce democracy" as well as in the Courts and Cabinets of sceptred Sovereigns. Nay, with the increased action of the tendency which has begun already to show itself in communities where the right of suffrage is universal or nearly so, of the tendency to throw the burdens of taxation wholly on the classes that possess land or other capital, the proletarian majorities are likely to grow more and more ready to push international jealousies and quarrels to the worst extreme, and to

Democracies equally fond of aggressive warfare.

vote for war-measures, of which they will enjoy the excitement and the expected triumphs, while they reckon that the cost will fall upon other members of the community.

By whom and how this new Theory was introduced.

By Napoleon I. when in the Zenith of his military triumphs and ambitious career.

398. It is worth while to look to who were the originators of this new theory, and to the manner in which it was first promulgated. It was introduced to public notice by the first Emperor Napoleon and his Ministers, at a time when the soldiery of Imperial France was enormous in number, perfect in organization and discipline, naturally proud of its victories, and justly confident in its own valour and in the genius of its great commander. It was paraded also at a time when France, notwithstanding her victories and her preponderant military power on land, was suffering grievously in consequence of the blows dealt to her mercantile marine as well as to her regular war-ships by the British navy. Perhaps, too, even then the prescient eye of Talleyrand foresaw the altered character of the resistance which French armies were likely to encounter, should they have to contend against the hostile populations of the countries which they invaded, and not merely against the professional troops that were levied by those countries' Sovereigns. In 1804 M. Portalis, as President of Napoleon's newly constituted Prize-Court, delivered an inaugural address, in which he stated that "It is the relation of things, not of persons, which constitutes War. It is a relation of State to State, and not of individual to individual. As between two or more belligerent nations the particular persons who compose those nations are enemies

Address of M. Portalis.

only by accident; they are not so as men; they are not so even as citizens: they are such only as soldiers."

Talleyrand's Despatch in 1806.

Talleyrand, in a despatch addressed to the Emperor Napoleon in 1806, said in the same spirit, "Three centuries of civilization have given to Europe a law of nations for which, according to the expression of an illustrious writer, human nature cannot be sufficiently grateful. This law is founded on the principle, that nations ought to do to one another in peace the most good, and in war the least evil possible. According to the maxim that War is not a relation between a man and another, but between State and State, in which private persons are only accidental enemies, not such as men, nor even as members or subjects of the State, but simply as its defenders, the law of nations does not allow that the rights of War, and of conquest thence derived, should be applied to peaceable, unarmed citizens, to private dwellings and properties, to the merchandise of commerce, to the magazines which contain it, to the vehicles which transport it, to unarmed ships which convey it on streams and seas—in one word, to the person and the goods of private individuals"*.

Talleyrand's unfair reference to Montesquieu.

399. It will be observed that Talleyrand, in this manifesto of the International Rights of War, pretended to support his thesis by the high authority of Montesquieu. But while he quoted so much of Montesquieu's maxim as requires that nations shall do

* Cited in a note by President Woolsey at p. 225 of his work. He takes it from Heffter (p. 226 note), who took it from the 'Moniteur' of 5th Dec. 1806.

He suppresses an important part of Montesquieu's maxim.

each other as little harm in War as possible, he carefully omitted the all-important qualifying clause, by which Montesquieu directs this abstinence from injuring the enemy to be practised only so far as the State's own true interest permits*. Now (as has already been explained) the true interest of a State that undertakes war for just cause, is to make the enemy suffer so as to regret the misconduct which brought the sufferings on him, and to make him consequently willing to purchase peace by giving compensation for past wrongs, and by giving security (if need be) against the repetition of similar wrongs in future. When a State is invaded and threatened with subjugation or dismemberment, the fact is still more obvious that its true interest is to weaken its adversary as much as possible. The real practical limitation which Montesquieu's maxim enforces, is (as we have already seen) the rule that the injuries done by one belligerent to another must be such as tell directly and substantially on the main purpose of the war—and that they must not be mere acts of cruelty and plunder, which cause very great misery to individuals, but exercise only an infinitesimal and precarious influence on the result of the armed struggle between the antagonistic aggregates of human beings that constitute respectively the Belligerent States.

* I repeat the words of Montesquieu. "Le Droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent dans la paix le plus de bien, et dans la guerre le moins de mal, qu'il est possible sans nuire à leurs véritables intérêts."—*De l'Esprit des Lois*, l. i. ch. 3; and see pp. 35, 364, *suprà*.

400. This, and no more than this, is the limit fixed by Vattel:—"Tout revient à cette règle générale; tout le mal que l'on fait à l'ennemi sans nécessité, toute hostilité, qui ne tend point à amener la victoire et la fin de la guerre, est une licence que la loi naturelle condamne"*. Chancellor Kent says†, "The end of war is to procure by force the justice which cannot otherwise be obtained; and the law of nations allows the means requisite to the end." "The persons and the property of the enemy may be attacked and captured, or destroyed, when necessary to procure reparation or security." I have already quoted the words of the great American Commentator which expressly recognize the old principle that a state "of War puts all the subjects of the one nation in a state of hostility with the other." Chancellor Kent care-

Vattel's statement of the General Principle of Warfare, and of its limitations.

Chancellor Kent's.

* Vattel, Livre iii. ch. ix. sect. 172. He gives the same rule at the beginning of the 8th chapter of his 3rd book. He states there, that the object of a just war is "de se procurer par la force, une justice que l'on ne peut obtenir autrement; de contraindre un injuste à réparer l'injure déjà faite, ou à donner des sûretés contre celle dont on est menacé de sa part. Dès que la guerre est déclarée, on est donc en droit de faire contre l'ennemi tout ce qui est nécessaire pour atteindre à cette fin, pour le mettre à la raison, pour obtenir de lui justice et sûreté. La fin légitime ne donne un véritable droit qu'aux seuls moyens nécessaires pour obtenir cette fin; tout ce qu'on fait au delà est réprouvé par la loi naturelle, vicieux et condamnable au tribunal de la conscience. De là vient que le droit à tels ou tels actes d'hostilité varie suivant les circonstances. Ce qui est juste et parfaitement innocent dans une guerre, dans une situation particulière, ne l'est pas toujours en d'autres occasions; le droit suit pas à pas le besoin, l'exigence du cas; il n'en passe point les bornes."

† Vol. i. p. 99.

fully explains (as do all other Publicists, except, I believe, Bynkershoek and Wolf) that all wanton and unnecessary violence to person and property is illegal.

Wheaton's. Wheaton states as a general principle, that the rights of a Belligerent relatively to an enemy are commensurate with the object of the war, and that, strictly speaking, the Belligerent has, in order to arrive at that object, a right to employ all means in his power, but that public opinion and the feelings of civilized mankind, influenced and enlightened by the humane reasonings of Grotius, Vattel, and other Publicists, have introduced many limits to the practical exercise of that right*.

Hautefeuille. M. Hautefeuille discusses this subject very fully in the first volume of his treatise on the rights and duties of Neutrals†. He says, "Le droit de la guerre à mon avis est effectivement de faire le plus de mal possible à l'ennemi afin de le forcer à demander la paix ; de le contraindre à accepter les conditions que l'on veut lui imposer." But he elsewhere points out that this general primary right is "soumis à un grand nombre de restrictions par la loi naturelle elle-même, et surtout par le droit des gens secondaire." These Secondary Laws of War are "non écrites, mais adoptées par tous les peuples." In a passage (which we shall have occasion, in another part of this treatise, to consider more in detail) he comments on the difference between the customary law of War as to the seizure of private property on shore, and as to

* Wheaton's 'Elements,' tom. ii. p. 1 *et seq.*

† P. 310.

the seizure of private property at sea. And he says of this difference, that "L'usage suivi sur mer me paraît le seul conforme à la loi primitive, d'après laquelle le belligérent a le droit de nuire à son ennemi par tous les moyens directs qui sont en son pouvoir." In his opinion it has not been merely out of feelings of humanity, but out of regard to their own self-interest also, that the milder customary law as to private property on land has been introduced, according to which it is generally exempt from seizure and confiscation. I shall have occasion to cite his reasonings on this subject when we deal specifically with the rights of Belligerents as against each other.

General Halleck says*, "The law of nature gives to a belligerent nation the right to use such force as may be necessary, in order to obtain the object for which the war was undertaken. Beyond this, the use of force is unlawful: this necessity forms the limit of hostility between subjects of the Belligerent States. They, therefore, have no right to take the lives of non-combatants, or of such public enemies as they can subdue by other means, nor to inflict any injuries on them or their property, *unless the same should be necessary for the object of the war.*" When we read this and similar passages, the question recurs again and again, "What is to be the test whether any particular measure of violence is or is not necessary?" I repeat the answer already suggested in this chapter:—"A measure of violence towards the enemy is neces-

General Halleck's.

Question, What is the test of the necessity which justifies acts of violence?

* P. 412.

sary then, and then only, when less severe measures are ineffectual, and when the proposed measure tends directly and substantially to effectuate the just purpose of the war. When acts come within this category, they come within the rule very pithily formulated by Mr. Stanton, the American War-minister during the late Civil War. "No aphorism is more universally received than that 'the sole object of a just war is to make the enemy feel the evils of his injustice, and by his sufferings amend his ways. He must therefore be attacked in the most vulnerable quarter'"*.

Stanton's Aphorism.

401. I will conclude this list of authorities with a very comprehensive and clear statement by Sir R. Phillimore, of the nature and object of the secondary or limitary rules of War:—"The great principle on which all these rules are framed is that of, on the one hand, compelling the enemy to do justice as speedily as possible, and, on the other hand, of abstaining from the infliction of all injuries, both upon the subjects of the enemy and upon the Government and subjects of third Powers, which do not *certainly and clearly* tend to the accomplishment of this object"†.

Sir R. Phillimore's opinion.

402. As is remarked by Vattel in the passage last quoted from him, the necessity of particular measures must chiefly depend on the circumstances of each case, and the lawfulness of particular measures must, there-

The necessity must often depend on the circumstances of each case.

* Report of Secretary at War, Dec. 1, 1862, cited in Draper's 'History of the American Civil War,' vol. ii. p. 581.

† Vol. iii. p. 68.

fore, vary from time to time; still there are some general rules which all civilized nations recognize. We shall have to consider these presently in detail. What we have hitherto chiefly attempted has been the investigation of fundamental principles, so as to make two negative propositions clear. The first of these is, that War is not a condition of licensed promiscuous violence. The second is, that War is much more than a duel between two Belligerent Governments. If these leading tenets are borne in mind, and if we understand aright Montesquieu's maxim, that a State should do its enemies no more evil in war-time than the true interests of the State require, we shall have made much progress towards gaining a comprehensive and useful idea as to what War is, and as to what War ought to be. We shall also understand what War is not, and what War cannot be.

Disguise War as you will, it is a hideous evil. It never should be aught but a last resort.

403. Even if it were possible to realize all the mitigations of warfare that have ever been imagined, War would continue to be what it is essentially—a hideous evil, cruel in itself and cruel in its consequences. It is a mere common-place to pronounce that such a curse ought not to be let loose among mankind without great and grievous reason—and that no State ought to have recourse to hostilities, so long as there is any reasonable probability of obtaining redress and security by pacific means. But, like many other common-places, these things are not the less true from being truisms, though they are apt on that account to be generally ignored and frequently forgotten.

The advice of the Wise Man as to how we should deal with a friend, from whom we believe ourselves to have sustained wrong, should be adopted by a State in its dealings with other States, even in cases where national prejudice is apt to be most fiery. "Admonish a friend; it may be he hath not done it, that he do it no more. Admonish a friend; for many times it is a slander, and believe not every tale. Admonish thy neighbour before thou threaten him"*. Attention to this precautionary duty in dissensions between nations may prevent much misery to many. I will refer here to two Publicists of our own times, who not only teach the maxim, but give practical proofs of its beneficial operation. General Halleck says, "It not unfrequently happens that what is at first looked upon as an injury or an insult, is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offence. Moreover the injury may result from the acts of inferior persons, which may not receive the approbation of their own Governments. A little moderation and delay, in such cases, may bring to the offended party a just satisfaction, whereas rash and precipitate measures often lead to the shedding of much innocent blood. The moderation of the Government of the United States, in the case of the burning of the American steamboat 'Caroline,' in 1837, by a British officer, led to an amicable adjustment of the difficulties arising from a violation of

Utility of temperate statement of alleged grievances between nation and nation, and of honest discussion.

Reference to General Halleck.

Good effects of moderation of the United States Government in discussing the case of "The Caroline."

* Ecclesiasticus, xix. 13, 14, 17.

neutral territory, and saved both countries from the disasters of a bloody war"*.

Reference to Dr. Abdy.

Dr. Abdy also, in his edition of Kent's Commentaries, so far as they apply to International Law, quotes the case of the 'Caroline.' He adds some valuable comments on the case of 'The Creole' (already referred to in another part of this volume)†, and the "furious storm of indignation" in the Southern States of the Union against Great Britain, which threatened instant war, and in all human probability would have caused it, had it not been for the friendly and courteous spirit in which the American and British Governments carried on their communications on the subject with each other. The "Tahiti affair," sometimes called the "Pritchard indemnity question," between England and France, in 1844, deserves even more attention. In this transaction the menacing effects of popular indignation at a supposed gross national insult, were averted by the fairness and the temperance with which one Government made its claim for redress, and by the readiness on the other side to enter into a calm investigation of all the circumstances of the case, and "to listen to reason and justice rather than to give way to national vanity." The English Publicist truly observes on these pattern cases of "The Caroline," "The Creole," and the "Pritchard Indemnity," that "Here we have three occasions on which, by the self-action of the parties concerned, by a cool and candid examina-

His comments on the conduct of the United States and the British Governments in the case of "The Creole."

Prudent conduct of English and French Statesmen in the "Tahiti affair."

* Halleck, p. 290. † See *suprà*, p. 271, n.

tion of the subject of dispute, and by a gentle method of terminating differences, three of the greatest countries in the world set examples of forbearance, that deserve to be recorded as precedents worthy of imitation"*.

Mediation.

It frequently occurs that differences between two States are investigated with a view to pacific arrangement under the friendly mediation of a third State.

Distinct from Arbitration.

Mediation is a distinct thing from Arbitration. When the services of a Mediator are accepted, there is no undertaking, expressed or implied, on the part of the disputants that the recommendations of the Mediator will be adopted. The utmost to which they can be considered to pledge themselves is, that they will supply the Mediator with fair means for learning the real facts of the case, and the arguments on both sides—and that they will listen with respectful attention to the Mediator's advice, and to such reasons as he may give in support of it. Yet much good may be done,

Beneficial effects of Mediation.

and much evil may be averted, by mediation. Arguments which are heard with suspicion and stubbornness, when urged by a rival or a supposed enemy, will often obtain deference, and will act upon the national Αἰδώς, when they come from a disinterested source, and from one having moral authority. Moreover, as there is nothing in the process of mediation by which a State's power to do "what seems right in its own eyes," can be in the least degree diminished, many matters, which affect national pride or national vital interests, may be discussed before a Mediator,

* Kent's 'International Law,' by Abdy, p. 172.

although there might be an unwillingness to make them topics for Arbitration. Count Calvo gives an instance of this in the settlement, in 1844, of long-standing disputes between Spain and Morocco, on account of the predatory attacks continually made by armed Morocco bands on the Spanish territory of Ceuta. The Governments of France and England offered to act as Arbitrators; but Spain refused to submit to the arbitration of strangers on a matter which was clear, and which affected her dignity and honour. The Cabinets of Paris and London then modified their proposal, and offered to act as Mediators. This was accepted; and the result of the inquiries and discussions which ensued, was a settlement of all differences between Morocco and Spain, and the reestablishment of friendly feelings, which endured for some time between them*.

Successful mediation of France and England between Spain and Morocco.

404. A question has been mooted whether, when disputes have arisen between two States which threaten to cause a war, it is or is not a moral duty incumbent on other States to offer their mediation. Galiani† and D'Hautefeuille‡ are of opinion that neutrals ought to avoid this interference in the affairs of others. Hübner considers it to be the most important duty that nations in general can discharge: and the general current of modern authority is in favour of the proposition, that "It is the business of every nation that has sufficient power and influence to make its voice

Are States bound to proffer Mediation?

It is a moral Duty, subject to certain conditions.

* Calvo, vol. i. p. 789.

† *Dei Doveri dei Principi Neutrali*, c. 9. p. 162.

‡ *Droits et devoirs des nations neutres*, tome i. tit. 5. sect. 1.

heard, when there is a danger of peace being disturbed, to spare no trouble in efforts to preserve that peace" *. Some Publicists add the prudent qualification that "Much must depend upon the subject of dispute, the character of the disputants, and upon the position and authority of the State which tenders the good office"†. Injudicious attempts at mediation may do more harm than good. M. Calvo says truly that "Certaines médiations dans les circonstances où elles se produisent, peuvent assumer un caracterè di prépotence, d'hostilité déguisée, blessant pour ceux à qui elles sont offertes"‡. And certainly the task of peacemaker requires not only acknowleged integrity and strict impartiality, but also great tact and delicacy in its performance.

International Arbitration.

405. Another mode of pacific settlement of International disputes is the seemingly more efficacious process of Arbitration. The parties who submit their differences to arbitration are considered to bind themselves by implication, even if not by express covenant, to obey and execute the award of their self-chosen tribunal on the matters brought before it, subject to certain exceptions, which will be presently mentioned.

What Arbitrators usually chosen.

406. When Sovereign States agree to settle their disputes by Reference, they usually select the Head or chief executive officer of some other Sovereign State as their Arbitrator. It is common, when the matters in dispute are very important, to appoint more than

* *De la Saisie des Bâtiments neutres*, t. i. pt. i. chap. 2, sect. 11.

† Phillimore, sect. 4; and see Halleck, p. 292.

‡ Calvo, tome, i. p. 781.

one Arbitrator. There is no jural requirement that Sovereign States shall be judged by their Peers—that is to say, by other Sovereign States acting through their chief executive officers. The gravest dissensions of even the mightiest nations may be referred for settlement to individuals, whether Publicists, Lawyers, or persons not in any way professionally acquainted with jurisprudence. But the reference to Heads of States, or to such persons as the selected Heads of States may nominate, is most common and convenient. Sometimes the Treaty, or other instrument of submission to Arbitration, specifies the rules and principles, or some of the rules and principles, according to which the inquiry is to be conducted and judgment pronounced. When no such instructions are provided, the Arbitrators proceed according to the rules of the Civil Law. Thus, it is their duty to act jointly, to discuss and deliberate in common, and in case of difference of opinion among them, the opinion of the majority is to prevail. In the case of an equality of votes the Reference becomes ineffectual, as the rule of the Roman Law, which empowers Arbitrators to call in an Umpire nominated by themselves, is not adopted in International Arbitrations*.

Arbitrations, how conducted.

407. The party against whom an award is made is not bound to obey it, if the Arbitrators have exceeded the powers given to them by the Instrument of submission, or if it has been procured by manifest fraud or corruption. Other reasons for refusing to acknowledge the validity of an award are given by

Cases where an Award may be repudiated.

* Calvo, 791. Heffter, p. 209.

some writers of eminence. According to Heffter, it may be repudiated for any of the following, among other, reasons:—*a.* if it has been made by Arbitrators who have proved absolutely incapable; *b.* if the arbitrator, or the opposite party, has not acted with good faith; *c.* if the parties, or one of them, have not been understood; *d.* if the provisions of the award are absolutely contrary to the rules of justice, and consequently could not form the subject of a valid agreement to perform them*. Bluntschli expressly says that the decision of a tribunal of arbitration may be considered a nullity if it is contrary to International Law. He, however, qualifies this by adding that it is not to be impeached under the pretext that it is erroneous or contrary to equity. And he afterwards illustrates his meaning by saying that a Decision of Arbitrators cannot impose an obligation which the parties could not have established by a treaty†. Calvo, also, in his list of fatal objections to an award, includes the case of "lorsque sa teneur est absolument contraire aux règles de la justice, et ne peut dès lors faire l'objet d'une transaction"‡.

Exceptions allowed by Heffter.

By Bluntschli.

By Calvo.

Vattel says of Arbitration, that it is a method most reasonable and in perfect conformity with natural

* "Si ses dispositions sont contraires d'une manière absolue aux règles de la justice, et ne peuvent par conséquent former l'objet d'une convention" (p. 210). Heffter explains this by a reference to his 83rd paragraph, which states that a Treaty cannot be binding if it directs things to be done which are contrary "à l'ordre moral du monde, et notamment aussi à la mission des États de contribuer au développement de la liberté humaine."

† Bluntschli, p. 273.

‡ Tome i. p. 787.

law for terminating every difference which does not affect immediately the safety of a Nation*.

Recent movement in favour of International Arbitration.

408. There has of late years been a growing desire among the educated classes of all, or nearly all, civilized nations to make the principle of settling international disputes by Arbitration generally recognized and carried into practice. Projects, indeed, for the permanent establishment of European peace by means of tribunals of Reference have never been wanting since the times of Henry IV. of France, even if they cannot be traced to still earlier dates. But recently the subject has been taken up with unprecedented earnestness, and with an amount of Jural ability as well as of enlightened philanthropy, which deserve the respect even of those who think such theories impracticable.

Old projects for universal pacific settlements of disputes.

Modern zeal on the subject.

Unfair prejudice of some of its opponents.

An unfair prejudice is sometimes created against the supporters of the International Arbitration principle by representing them as advocating this mode of reconciling adversaries in all possible kinds of disputes, including a nation's opposition to preposterous claims, which might be made on it solely for the sake of "trying the lottery of the law" on a grand scale, and of taking the chance of getting a verdict from a conclave of sovereigns or statesmen strongly prejudiced against one party to the dispute, or from a tribunal of pedantic gownsmen, deficient in common sense and incapable of comprehending political causes and effects. But the chief advocates of the Arbitration system freely admit that there are classes of cases to which it is inapplicable. Aggressions and

Cases in which the inapplicability of Arbitration is conceded.

* Livre ii. ch. xviii. p. 329.

demands may be made on a nation which seriously menace its national honour and existence. A claim may be palpably, and even insolently, unreasonable. No State with a due sense of self-respect will permit such things to be treated as arguable matters. I would add that a State is under no moral obligation to enter into a reference, when it has reason to believe that a prejudice exists against it among those who would have (directly or indirectly*) to decide the matter.

Present discussion as to Systems of International Arbitration.

409. The very interesting discussions that are now, from time to time, carried on among meetings of publicists and statesmen, and in the legislatures of some of the chief civilized Powers, on this great subject, are too numerous and too complex for me to

* When Heads of Sovereign States are named as Arbitrators, it is not expected that they will personally conduct the Reference. They usually employ eminent Jurists of their nation. Their case is an exception to the general rule respecting Arbitrators, according to which "Delegatus non potest delegare." 1 Calvo, p. 791. It is impossible to become familiar with the writings of the modern Continental Jurists without observing the ill will with which they regard the Naval ascendency of England. Far be it from me to insinuate that these gentlemen would act with wilful partiality on any international tribunal before which weighty questions arose as to how we had acted in maritime matters, or which was called on to assert principles and to lay down rules seriously affecting the extent of our naval power, and its immediate applicability for defending ourselves and for weakening our enemies. But it would show a total lack of political and forensic experience, and an almost childish ignorance of human nature, to suppose that we should labour under no undue disadvantages in such references. I will quote a passage from one of the most eminent of the authors whom I have

attempt to review them here. The opinion is general, that for a system of general International Arbitration to be effectual, it must be supported by a convention of the principal States of the Old World and of the New, who must be pledged to enforce both the submission of disputes to Reference and the due performance of awards, save in certain defined classes of exceptional cases. There can be little hope of seeing such a convention cheerfully agreed to and loyally carried into execution while several of the greatest Powers retain their present mood of mutual suspicion, and continue their gigantic preparations for warfare. But this is no reason for disparaging the labours of statesmen and writers, who strive by argument and fair persuasion to bring about a more pacific general feeling, and gradually to win effective consent to the recognition of principles and practices which may diminish the frequency of Wars, even if Warfare cannot be altogether abolished.

410. We have hitherto been examining the pacific means that are, or may be, open to a State for obtaining redress or security in cases of International Wrong. Supposing these methods to have been proved inap-

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alluded to, which is evidently levelled at England:—"La suprématie même partielle d'un état peut menacer la sûreté et la liberté des autres, et par là porter atteinte à l'équilibre. Elle justifiera donc la résistance commune des autres états pour restreindre cette suprématie. Ce principe sera particulièrement applicable lorsque la puissance maritime d'un état prendra un développement dangereux pour la liberté des mers."—Bluntschli, *Droit International*, sect. 100, p. 102, ed. 1874.

plicable or ineffective, we have next to examine the laws under which Force may be employed; in other words, we come to the laws of War. Yet, before a State begins complete and regular War with its enemy, it is sometimes open to it to employ certain measures of what we may term imperfect or limited Warfare, measures which put a constraint, or an amount of suffering on the adversary, which may induce him to offer satisfaction, or to acquiesce in the injured State having taken the law into its own hands, and having satisfied itself. There are two kinds of this Imperfect Warfare—one called Retorsion, the other called Reprisals. Some writers class here a kind of partial Blockade, which they term "Pacific" or "Commercial." But Blockade is essentially a Belligerent Right; and the kind of blockade called pacific or commercial, being limited to ships and cargoes of the offending Party, and having no operation as against neutrals, is really nothing more than a branch of Reprisals. The same may be said of the Embargo which is sometimes laid on vessels and cargoes of the State from which redress is to be enforced.

Limited or Imperfect Warfare.

Retorsion.

411. RETORSION is a kind of *Lex talionis*, by which a State which considers itself to be injured by the line of conduct pursued towards it by another State, adopts a similar line of conduct in corresponding circumstances towards the State whereof it complains*.

* RETORSION is sometimes treated as a mere branch of reprisals; but Bluntschli's definition of it seems to be correct. He says that, "La Rétorsion n'a pas pour but de se venger d'une injustice. Elle est un moyen de s'opposer à ce qu'un Etat exerce ses droits au préjudice des autres."—*Droit International*, sect. 505, p. 285.

412. REPRISALS sometimes mean those acts of severity beyond what is generally sanctioned by the customary laws of war, which commanding officers during actual war inflict on the enemy, on account of illegal violences already practised by the enemy, and with the design of deterring him from persisting in such outrages. Reprisals, in this sense, will require much of our attention in the next chapter. At present we are to consider Reprisals as measures of forcible redress taken by one State against another, without necessarily entering into actual and general warfare, though War is very likely to result from their adoption. Vattel, in a passage cited and adopted by Mr. Dudley Field*, thus describes them :—"Reprisals are used between nation and nation to do themselves justice, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or to keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated; and then the function of Reprisals is completed"†.

Reprisals.

Meaning of, in operations in War.

Reprisals here considered as measures of forcible Redress, short of regular War.

Vattel's description of them.

* Draft Outlines of an International Code, p. 472.

† Vattel, Livre 2. c. xviii. sect. 342. I have not literally

General Halleck's description of Reprisals.

413. I will add to this extract from Vattel the description given by General Halleck of the nature of Reprisals, and some of his remarks upon the caution and moderation which should always be observed as to employing them. Parts of this subject have been already adverted to, in the chapter in which we had to consider a State's right and duty as to protecting its citizens, and in which we considered also the conflict that sometimes arises between the right and duty of one State in this respect and another State's right to independence*. General Halleck says that "Reprisals are resorted to for the redress of injuries inflicted upon the State in its collective capacity, or upon the rights of individuals to whom it owes protection in return for their allegiance. They consist in the forcible taking of things belonging to the offending State or of its subjects, and holding them until a satisfactory reparation is made for the alleged injury. If the dispute is afterwards arranged, the things thus taken by way of reprisal are restored, or, if confiscated or sold, are paid for with interest and damages; but if war should result,

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adopted Mr. Field's translation of the last sentence.

Vattel in his next paragraph, observes, that "Le droit des gens ne permet les représailles que pour une cause évidemment juste, pour une dette claire et liquide. Car celui qui forme une prétention douteuse, ne peut demander d'abord que l'examen équitable de son droit. En second lieu, il faut avant que d'en venir-là, que l'on ait inutilement demandé justice, ou au moins que l'on ait tout lieu de croire qu'on la demanderait vainement. Alors seulement on peut se faire soi-même raison d'une injustice."

* See pp. 157, 311 *supra*, and Bluntschli, as cited in note to p. 157.

they are condemned and disposed of in the same manner as other captured property taken as prize of war. As reprisals bring us to the awful confines of actual war, it is proper to inquire what kind of injuries inflicted upon the State collectively, or upon its individual members, justify a resort to so dangerous a measure of redress. It is only in cases where justice has been *plainly denied or most unreasonably delayed*, that a Sovereign State can be justified in authorizing reprisals upon the property of another nation. Moreover the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded, and the demand refused. If it be an individual, the claimant must first exhaust the legal remedies in the tribunals of the State from which the claim is due; and after an absolute denial of justice by such tribunals, his own Government must make the demand of the sovereign authorities of the offending nation"*.

Caution and moderation necessary in exercise of Right of Reprisals.

414. General Halleck proceeds to comment with some severity on the vehemence shown by the British Government in 1850, in authorizing reprisals on the Greeks for alleged wrongs suffered by Don Pacifico, a British subject. For a clear case the other way, a case where the wrongs done to British subjects were so heinous, and the hopelessness of obtaining justice from the local tribunals was so patent, that heavy measures of reprisals would have been fully justifiable, unless apology and compensation had been offered,

The Don-Pacifico case

* Halleck, p. 297.

The Greek-Massacre case.

we might refer to the "Greek Massacre" case in 1870. That case, and the comments of Lord Selborne on the international duty of one State towards another as to local administration of justice, have already been mentioned in this volume*.

Positive and Negative Reprisals.

415. Reprisals are classified into, 1st, *Positive*, and, 2ndly, *Negative* Reprisals, sometimes termed "*Active*" and "*Passive*." The Reprisals to which we have been more particularly referring in the last paragraphs, and which are the most common in practice, are Positive Reprisals. But a wronged State may retaliate on another by refusing to fulfil some obligation, or to permit the other to exercise some right. Such measures are called Negative Reprisals. Positive Reprisals may always be treated, by the State on which they are inflicted, as measures of actual warfare, and may be resisted or resented accordingly by open hostilities. If it should not so treat them, and if the differences between the two States are ultimately settled by agreement, the original owners of the property seized when Reprisals were taken, are considered not to have lost their rights of property. But if regular War is the result, the ships and cargoes that have been detained by embargo or capture, and other goods that have been seized, are considered to be enemy's property and liable to confiscation, and to have borne that character from the very time when they were taken under the exercise of the right of Reprisals. "The subsequent hostilities have a retro-

The State on which Positive Reprisals are inflicted may treat them as open warfare.

Right of Property in things seized.

* P. 307, note, *suprà*.

active effect, and render that taking a hostile measure *ab initio*"*.

Declaration of War.

It was formerly thought essential for the lawfulness of War, that the State about to make it should first issue a solemn Declaration of its purpose. But, as Chancellor Kent states, "in modern times the practice of a solemn declaration made to the enemy has fallen into disuse. * * * It has become settled that war may lawfully exist by a declaration which is unilateral only, or without a declaration on either side. It may begin with mutual hostilities. * * * But though a solemn declaration or previous notice to the enemy be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. War, says Vattel, is at present published and declared by manifestoes. Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them."

Dr. Abdy adds to these sentences of Kent the observation, that "In modern times documents of this kind are used as formal and solemn justifications to the rest of the world of the conduct and ulterior

* Kent's 'Commentaries,' vol. i, p. 70; Lawrence's Wheaton, tome i. p. 276; Halleck, p. 297.

views of the belligerent immediately interested; they will therefore be generally found to contain other matters than a simple declaration of war, and to be intended not so much for warning to the subjects of the belligerent nation of the fact of war, as for an appeal to public opinion. The fact itself, thanks to the publicity given to the discussions and debates of nations on subjects of international importance by the press, and by the improved condition of international intercourse, is often known long before the last manifesto or declaration appears; and it not unfrequently happens that warlike intentions are proclaimed by other preliminaries than manifesto or declarations, as, for instance, by the recall of ambassadors, by the tender of an ultimatum, or by peremptory language followed by hostile acts."

The best practical rule for determining the exact date at which a State of regular and formal warfare should be considered to have commenced is that given by General Halleck*. "The legitimate consequences of war flow directly from the state of public hostilities; and the effects, which the voluntary law of nations attributes to solemn war, date with respect to belligerent rights from the commencement of such hostilities; and with respect to neutral duties, they date from an official announcement or a positive knowledge of the existence of the war."

How a Declaration of War affects a State with regard to its enemy's Allies.

416. It remains to make a few remarks as to the Jural position in which a Manifesto of War places a Belligerent State with regard to its enemy's Allies.

* Page 354.

More will be said in another part of this work as to the nature and real extent of the obligations which Treaties of Alliance impose upon the Contracting States. For the present we only need inquire whether a Declaration or Manifesto of War does or does not place the Allies of each party *ipso facto* in a state of Belligerency with the other party; and, if not, whether it produces any, and, if so, what effects on the relations between the Allies and such other party.

Distinction between mere Treaties of Amity and Treaties for Martial Co-operation.

417. We must distinguish here between Treaties which merely profess to bind States in amity and good-will as to each other, and Treaties which stipulate for express cooperation or help in the event of warfare with third parties. The compacts of the first class are like the conventional phrases of mutual devotion in private society, and practically count for nothing. We must distinguish, on the other hand, between Treaties for martial cooperation generally, and Treaties for martial cooperation notoriously made in expectation and in furtherance of the very war which is breaking out. In such a case you (the State against which such Treaty is levelled) have clearly a right to treat the State, which is your principal enemy's accessory before the fact, as a principal in the war itself, and to include such State in your Declaration of War, and in those prompt measures which, as we have seen, one Belligerent may lawfully take against another at the very commencement of the War. Yet even here it is apprehended that you may, if you please, waive or defer the exercise of your right.

Various kinds of Treaties for Martial Co-operation.

You may remonstrate with the Accessory Enemy, and call on him to renounce his projects against you. Even if he refuses to do this, and yet does not absolutely attack you, you may, as a matter of prudence and out of regard to your self-interest, abstain from treating him as a Belligerent. This will sometimes be the case. Nations, like men, will occasionally bluster and threaten, and vow vengeance and havock, and yet will, when the hour for action comes, recoil from actually joining in deeds of violence. In such a case you may, by your prudence and self-control, escape having a sword thrown into the scale against you, which must have turned the balance with fatal effect between you and your main, your real adversary.

As to your enemies' Allies under Treaties of Offensive and Defensive Alliance, or of Defensive Alliance only.

418. But the most common case is where, at the outbreak of a war, a State has to deal with an enemy between whom and third States there are Treaties of Offensive and Defensive Alliance, or of Defensive Alliance. There is not in reality the amount of difference between these two classes of Treaties which at first sight appears to exist; "for many wars which are defensive in *operations* are essentially offensive in their character and principles. In the words of Wheaton, 'where attack is the best mode of providing for the defence of a State, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered because the wrong-doer is reduced to *defensive* warfare. So a State against which a dangerous wrong is manifestly meditated may prevent it by striking the

Not much real difference.

first blow, without thereby waging a war in its principle offensive' "*.

Such Treaties only binding on condition that the War is a just one.

419. In all these compacts of warlike alliance, every treaty is held to contain the tacit clause that it shall not be binding, except in case of a *just war*; and the Ally, who is "to render the assistance, has a right to decide for himself upon the character of the war, and whether or not the *casus fœderis* has taken place"†. The advice which General Halleck founds on this is as humane and sensible as the principles which he maintains are sound. "A warlike Alliance made by a third party, before the war with a State then our friend but now our enemy, will not, as a general rule, be of itself a sufficient cause for commencing hostilities against such third party; for there may be good reason why he should not regard himself as bound by the obligations of the alliance. It would certainly be very impolitic as well as improper for us to treat as a belligerent one who may not be disposed to become our enemy. The character of the alliance and the peculiar circumstances of the case must serve as guides for our conduct, always keeping in mind the maxim, that it is better to have a friend than an enemy, and the rule of international law that we are justifiable in engaging in hostilities only so far as may be necessary for our own security and the protection of our just rights"‡.

420. You certainly have a right in such a case to

* General Halleck, p. 417.

† *Ibid.* 417; Vattel, liv. 3, chap. 6, sect. 83. Wheaton's 'Elements,' 1, part iii. ch. 2, 15. Abdy's 'Kent,' 180.

‡ Halleck, p. 415.

Right to call upon the Ally to declare his intentions.

call upon the Ally of your opponent to declare whether he means to act against you or not; and if he refuses to give an express renunciation of hostile intentions towards you, you are in every way justified in forthwith treating him as your enemy, unless you consider, as above explained, that it is for your interest to forbear from doing so.

As to Treaties for limited and defined succour.

421. Sometimes the treaty of Alliance between your adversary and the third State does not agree generally and without limitation for help in warfare to be furnished by one to the other, but only that a stipulated amount of troops, of ships of war, of money, &c. shall be supplied. Where this is the case, and there is no additional promise looking to an eventual cooperation in general hostilities, the execution of such a treaty (according to the authorities) does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. General Halleck adopts this doctrine*, and appeals for it to Wheaton, Vattel, and others. But I must observe that it appears to me that, so far as regards giving the State which supplies the troops &c. an absolute right to be treated as a neutral by the State against which those troops &c. are to act, this doctrine should be regarded as emanating from the very lax theories about the duties of Neutrals, and their being at liberty to allow levies of troops, and even to supply troops to either belli-

* P. 419.

gerent, which were prevalent down to the times of the French Revolutionary war, when the United States introduced more wise and just principles and practices in this behalf. More will be said on this subject in a coming chapter on the rights and duties of Neutrals. It seems to me clear that the Belligerent State against which the troops, &c., are sent by its adversary's Ally, may, if it pleases, regard such a participation in the war as an act of hostility by the Ally, and may, if it pleases, forthwith treat such Ally as a belligerent enemy. But there is a discretionary power to abstain from so treating it*.

* Martens (p. 308) observes on this subject, that "strictly speaking, a Belligerent Power has a right to treat as his enemies all the powers who lend assistance to the enemy, from whatever motive, or in consequence of whatever treaty. However, policy has induced the Powers of Europe to depart from this rigorous principle. They now admit:—1, that a sovereign who furnishes troops in virtue of a treaty of subsidy does not thereby become the enemy of the Power against which those act; 2, that as long as a sovereign sends to the assistance of his ally no more than the number of troops &c. stipulated for in the treaty of alliance, and does not authorize them to serve upon any other footing than the one specified in the treaty, such a sovereign ought to be looked upon as an auxiliary, and not as the enemy of the Power against which his troops make war; and, of course, that such sovereign ought to be permitted to enjoy his rights of neutrality. This is more especially the case when the aid of an auxiliary is the consequence of a treaty of *general defensive alliance* concluded before the beginning of the war.

"We have seen some Powers claiming the rights of neutrality even while they were furnishing the greatest part of their troops, and contributing principally to the resisting of the enemy and the continuation of the war; but imperious circumstances and motives of policy only can induce the

CHAPTER XI.

On Rights and Duties between the Belligerents.

Recapitulation of Primary strict Laws of War, and of Secondary milder Laws of War.—Extent of the Influence of the latter.—Question considered of how far the old strict Rules have become dormant, and how far they have become extinct among civilized Nations.—Question considered of What, if any, is the Sanction of the Secondary milder Laws?—Remarks on recent Russian and English State Papers on the subject.—Duke of Wellington's Despatches in 1828.—The Solonian Maxim applicable.—Modern Laws of War as between combatant regular Forces.—Right to Quarter.—Cases of supposed useless Resistance by Garrisons and Ships of War.—Treatment of Prisoners of War, and of Enemy's Sick and Wounded.—Hospitals, Asylums, &c.—Means and Implements of War.—Use of poisoned Weapons, or of unnecessarily cruel Weapons.—Of poisoning Wells or Food.—Of cutting off Supplies.—Of Assassination.—Of use of Spies and Traitors.—Of Reprisals.—Who are to be regarded as Non-combatants?—How are they to be treated? Rights and supposed Rights as to Private Property.—Of Requisitions and of Confiscations.—Of devastating Territories, and removing Inhabitants.—Of sacking Towns taken by Storm.—Of governing Hostile Provinces while under temporary Occupation.—Of Insurgent Inhabitants, and Levies *en masse*.—Of Privateering.—Of Capture and Condemnation of Vessels and Cargoes.—Of Suspension of Arms, of Truces, Armistices, Passports, Safe-conduct, and Cartels.—Of Belligerency when one Party is not a recognized Sovereign State.

Recapitulation of old Strict Laws of War.

422. We have seen the strictness of the old Primary Laws of War; but we have seen also that War was

enemy to treat such Powers as neutral.

"When two Powers become Allies in form by carrying on the war in common and with all their forces, without doubt they may and ought to be treated as enemies by the adverse party."

recognized by the great Roman Jurists as subject to Law—nay, that it was regarded by them as being itself an Institution of Law, of the *Jus Gentium*, of the Law common to all civilized nations*. Reasons have been given for believing that Rome's Laws of War, as taught and studied by her Fetials, her Jurisconsults, her Statesmen, and her Generals during the struggling and conquering ages of the Commonwealth, were much more copious and explicit than the maxims on the subject which we learn from Roman Historians and Philosophers, and those which the compilers of the Imperial Institutes and Digests have preserved for us †. We possess, however, enough to enable us to comprehend the severity of the old War-code. It has been pointed out that it was lawful to inflict death or slavery on the conquered, and that, on the outbreak of a war, even those foreigners who had come into Roman territory for pacific purposes were liable to be seized and made slaves of. An enemy (under which phrase every member of the population of the hostile community was included) was considered to have no rights of property; and their land became the land of the conquering State.

Severity of the old War-code.

A fundamental exceptional rule on the side of humanity and magnanimity required that faith should

Its exceptional decrees on the side of magnanimity and generosity.

* See *suprà*, p. 369 *et seq.*, especially the passage from Hermogenianus, cited and commented on at p. 370. See also Montesquieu, *De l'Esprit des Lois*, Livre x., Chapitre 1, "*De la force offensive*;" and the commencement of Chapitre 2, "*De la guerre*."

† See pp. 89 and 373, *suprà*, and notes, especially the passage cited from Cicero's Speech for Balbus.

be kept in all compacts with the enemy, and forbade the employment of assassination or of treachery. It was also reckoned a breach of lawful warfare to put enemies to death after they had once been allowed to surrender and had received quarter*. Statesmen and generals who admitted enemies to surrender on such terms, were praised by philosophical writers for their clemency; but they had a perfect right to refuse quarter in the battle or the siege, or in the pursuit of the defeated foe, "dum fervebat opus," to use the expressive phrase of modern Jurists. It is quite true also that the Romans did not, as a rule, enforce their stern war-rights of confiscating the whole of the lands of conquered States, or of enslaving whole populations. It has been pointed out by Gibbon that, unlike other nations of antiquity, the Romans, instead of wholly enslaving or exterminating those whom they subdued, generally followed the policy of taking a portion only of the conquered territory, which they granted out to Roman colonists, who became garrisons of the Imperial Commander's power. The rest was left to the old inhabitants, to be held on terms more or less onerous to the subject class, according to the amount of resistance which they had shown, and the other circumstances of the case†. But in all this, and in some other mitigations of the extreme right of victory, the Romans were acting out of regard to policy, and not as under any compulsory rules to be merciful. Where the supposed interest of the conquering Republic required

General practice of the Romans as to persons and lands of conquered States not so severe as their principles.

* See Sallust de Bell. Jugurth. chap. 91, and p. 374, note, *suprà*.

† See also Montesquieu, Livre x. Chapitre 3, note to 4th paragraph.

sterner measures (as in the cases of Carthage and Corinth), dooms of destruction, of total confiscation of property of every kind, of wholesale slaughter, of selling into slavery all who escaped the edge of the sword, were unsparingly carried into execution. Dr. Abdy* cites one fearful instance of this, which occurred in the time of Augustus. "A Roman General, famed quite as much for his humanity as for his courage and soldierly qualities, Nero Claudius Drusus, met the Germans in the field, and not only defeated them with great slaughter, but laid waste whole districts, carried off the women and children into slavery, and hunted the men down like wild beasts." Many more cases of the kind might be mentioned; and one of the worst is to be found in Julius Cæsar's narrative of his campaign in Gaul against the Veneti. His boasted expeditions to Britain were in reality chiefly slave-hunting expeditions. Indeed so long as one of the principal means, by which a Roman general sought to enrich himself and his troops, was by the sale of war-captives, either for the purposes of prædial or domestic slavery, or to furnish combatants for mutual slaughter in the Roman gladiatorial exhibitions, there was always a terrible temptation to a Roman Commander both to engage in hostilities not necessary for the security of his province, and to conduct those hostilities in the most cruel manner.

Occasional acts of merciless severity.

423. I refer back to the last chapter† for comments on the Influences which mitigated the old rules of War, and on the origin of the Secondary Code

How far are the new and milder Laws of War matter of mere Comity?

* Abdy's Kent, p. 22. † P. 375, *suprà*.

of Laws of War. But something must be added here as to how much of these new so-called Laws of War are matters of mere Comity, or, at any rate, have not passed beyond the domain of Moral Law, and as to what really is the Sanction of such of the new Laws as we are disposed to regard as Laws Positive. These are far from being questions of mere speculative inquiry. Their practical importance is proved by the official correspondence between the British and Russian Governments during the January of 1875, on the Rules of Military Warfare*. I shall have occasion to cite and to comment on some portions of these very significant Despatches.

Practical Importance of these topics.

424. I must here, at the risk of offending by repetition, remind my readers that all these matters are to be scanned by the light of two great Principles, which perhaps should be regarded as merely different ways of propounding one great Principle, but which it is more convenient here to continue to speak of separately. One of these is the Principle of Modern Utilitarianism, to the consideration of which the third chapter of this book was devoted—the Principle that, in order to test the soundness and value of a line or rule of action, you must examine whether its whole tendency is or is not to promote in a reasonable degree the advantage, not merely of the acting party, but of all who are liable to be affected by it, if it were generally acted on as a rule. The other Principle to be borne in mind is that set forth in the oft-cited

Remember to use the guiding lights of True Utilitarianism and of Montesquieu's maxim.

* See House of Commons' 1875, and same, No. 3, Papers, Miscellaneous, No. 2, 1875.

maxim of Montesquieu, which has now for more than a century been recognized as a moral authority at least throughout the civilized States of Christendom, and which must be considered applicable to such other nations also, as have either expressly or by implication professed their adhesion to the International Law of that great mass of the Commonwealth of Civilized States* :—"Le Droit des gens est naturellement fondé sur ce principe, que les diverses nations doivent dans la paix le plus de bien, et dans la guerre le moins de mal, qu'il est possible sans nuire à leurs véritables intérêts"†. I have already carefully drawn attention to this most important qualifying clause of the part of Montesquieu's maxim, which directs nations to do as little harm to each other in War as possible. That abstinence from inflicting harm is only to be practised so far as is consistent with the Belligerent State's own interest. I have shown what this interest really is when we regard it by the light of International Jurisprudence. A Belligerent State's true interest is to weaken its adversary—to make its enemies suffer, so that they shall learn wisdom and justice by their sufferings, and shall be made willing (even if only out of dread of increased sufferings) to make compensation for past wrong, and to give security, if needed, against the repetition of wrongs. Such is the main purpose of every just war; and the harms to an enemy, which it is morally lawful to inflict with the view of effecting that purpose, are such harms only

* See *suprà*, p. 129 *et seq.*

† *De l'Esprit des Lois*, liv. chap. 3.

as tend to effect it directly and substantially, and not such acts of cruelty, spoliation, or waste, as cause misery to individuals, but only operate in an infinitesimal degree and by remote influence on the great results of the war*.

Secondary Rules which do not pass beyond the domains of Comity or mere Moral Law.

425. I will begin with those secondary Rules of Warfare, which, even if they can be regarded as more than mere matters of Comity, cannot be safely regarded as having passed beyond the domain of Moral Law, and for the breach of which no Sanction is provided, save that which is, technically speaking, no Sanction at all, the general disapprobation of civilized mankind.

As to seizure of Persons and Property of hostile States found in territory on outbreak of War.

426. First, then, as to persons and property of the enemy-nation, which are found within the territories of a Belligerent State at the outbreak of a war. Enemy's property, in this matter, includes debts due to such enemies, either by the Belligerent State itself, or by individual members of that State, though different modes of action may be adopted as to these different kind of debts.

Public Law as to this as expressed by Martens.

427. Without taking in detail the doctrines and sentiments expressed by various Jurists on this subject in modern times, I will cite, as expressing the general opinion which was held on it, the words of the Göttingen Professor Martens, written about a century ago. Martens says, "From the moment a sovereign is in a state of war he has a right, strictly speaking, to act as an enemy, not only with respect to the persons and property found in the territory of the enemy,

* See *suprà*, p. 364 *et seq.*

but also with respect to his enemy's subjects and their property, which may happen to be situated in his own territory at the breaking-out of the war. He has a right then to seize on their ships found in his ports, and on all their other property, to arrest their persons, and to declare null and void all the debts which the State may have contracted with them. However, nations, for their mutual benefit, have been induced to temper the rigour of this right. 1. In a great number of treaties nations have stipulated, in case of a rupture between them, to give each other's subjects residing in their territory at the breaking-out of the war, or coming to it not knowing of the declaration of war, a specified time for the removal of themselves and their property. 2. Sometimes it is agreed to let the subjects of an enemy remain during the whole course of the war, or so long as they live peaceably and quietly. 3. Besides these precautions taken between nation and nation, many States have provided, by particular laws and privileges, for the protection of the persons and property of enemy's subjects. 4. Generally speaking, a nation does not venture to touch the capitals which the subjects of the enemy may have in its funds, or that it may otherwise owe to such subjects "*.

General practice to abstain from violence and seizure.

428. During the last hundred years the almost universal practice of nations has followed the wise and humane policy of abstaining from all violence towards the persons and the property of members of the hostile State found within the territory of its adversary at

* Martens, p. 275.

Exception as to ships and their cargoes.

the commencement of a war. It is, however, to be noticed that this abstinence, as a rule, has not been extended to vessels and cargoes found in the ports or other territorial waters. More will be said of this distinction presently. First, with regard to persons. When war between England and France was renewed in 1803, Napoleon (then First Consul) ordered all the English between the ages of eighteen and sixty, who were then in France, to be seized and detained as Prisoners of War. He directed similar measures to be executed throughout the Italian and Batavian Republics, which were mere dependencies of France. Under these orders many thousand peaceable British travellers and traders were seized and detained at Verdun and other French fortified towns till the conclusion of the war in 1814. This harsh and oppressive measure had not and could not have any appreciable effect on the armed contest between England and France; but it caused an infinite amount of misery to the individual English who were seized under it, and also to their domestic circles at home. This act of vindictive hatred (for such, and such only, was Napoleon's motive) gave horror and distress to his own warmest friends, who vainly strove to dissuade him from it; and it has been invariably censured by historians and jurists of every nation who have referred to it. But it is not spoken of as a breach of strict International Law. General Halleck, treating of the Rights of War*, as they now actually exist, says that "one of the immediate consequences of the position in which the

Conduct of the First Consul in 1803, arresting and detaining English visitors to France.

General Halleck's comments on this.

* P. 360.

citizens and subjects of Belligerent States are placed by the Declaration of War is, that all the subjects of one of the hostile Powers within the territory of the other are liable to be seized and retained as Prisoners of War." He praises the milder practice which has now prevailed for very many years, and he blames Buonaparte for having resorted to means "so unusual and odious" for annoying the subjects of the hostile State. But he pronounces those means to be "within the limits fixed by the ancient and severer laws of War" *, and that "the extreme right still remains." So Sir Travers Twiss, in his quite recent publication, says that "the exercise of the *summum jus* of a belligerent in regard to enemy's subjects in *transitu* is not altogether obsolete, although it may be regarded as a matter of 'Comity between Belligerent Powers' to refrain from seizing and detaining as prisoners any enemy-subjects whatsoever, who may happen to be within their respective dominions at the outbreak of war, if they conduct themselves without offence" †. He narrates and comments in a proper spirit on Buonaparte's conduct towards the English *détenus* of Verdun, but he gives it no stronger jural epithet of blame than that of an exception to comity. I think it should be regarded as one of the worst specimens of contempt of International Moral Law that modern history can supply; but the case cannot be carried further ‡.

Those of Sir Travers Twiss.

* P. 362.

† P. 35.

‡ I need hardly add, that no attempt has been made for centuries to imitate the Romans by selling detained fo-

Recent practice of civilized nations.

429. The usage is now general to allow the subjects of the enemy to return freely to their homes with their effects after a specified time, or to remain peaceably in the country in the enjoyment of their property, unless circumstances should occur which make their absence desirable for the public interest, in which case they are to receive timely notice of removal.

As to seizure of goods and confiscation of debts.

430. With respect to seizure of private property found within the territory, and the confiscation of debts, an attempt was made to distinguish between their several liabilities to confiscation, in the judgment delivered by Mr. Justice Story, in the very important case of "The ship Emulous," reported in the first volume of Gallison's 'Reports,' p. 563. But that distinction was repudiated by the Supreme Court, when the case was brought before it on appeal. The case appears in the Supreme-Court Reports under the title of "Brown *v.* United States"*.

Important judgments of American Tribunals.

It is a very important decision; and the names of Mr. Justice Story and of Chief Justice Marshall (who presided in the Courts of Appeal) are justly so much respected by International Lawyers, that I shall pause to point out doctrines as to which these eminent Judges agreed, as well as those wherein they differed. Both courts were agreed as to the continued existence of the ancient right of a Sovereign of a Belligerent

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reigners into slavery. Remarks will be made hereafter as to the nature of the International crime which it now would be to treat Prisoners of War as slaves.

* 8 Cranch, p. 810.

State to seize the persons and to confiscate the properties of members of the hostile State found within the territory. But Mr. Justice Story held that by the mere declaration of hostilities the Sovereign authorizes any of his subjects to detain and appropriate in behalf of the Sovereign all such property as may come into his [the subject's] hands—an act of which the Sovereign may subsequently avail himself. The Appellate Court held, no less clearly than Mr. Justice Story, that the ancient right of seizure still exists; but they held that an express and solemn manifestation of the will of the Sovereign of the Belligerent State to enforce that right was necessary before the right became operative. No legal authority to seize and confiscate followed on the mere outbreak of War.

Mr. Justice Story had said, in his judgment as to the confiscation of debts, "On a review of authorities I am entirely satisfied that by the rigour of the Law of Nations and of the Common Law the Sovereign of a nation may lawfully confiscate the debts of his enemy during war or by way of reprisal." He afterwards says, as to this "summum jus," that "this, though a strictly national right, is so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of Congress would satisfy my mind that it ought to be included among the fair objects of warfare, more especially as our own Government have declared it unjust and impolitic. But if Congress should enact such a law, however much I might regret it, I am not aware that foreign nations, with whom we have no treaty to

the contrary, could, on the footing of the rigid Law of Nations, complain, though they might deem it a violation of the modern policy."

This was appealed from. Some of the most material portions of the judgment of the Supreme Court are as follows:—"As to enemy's property found on land at the commencement of hostilities, the declaration of war does not by its own operation so vest the property of the enemy in the Government as to support proceedings for its seizure and confiscation, but it vests only a right, the assertion of which depends on the will of the sovereign.

"Respecting the power of Government no doubt is entertained. That war gives to the sovereign full right to take the person and to confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.

"Between debts contracted under the faith of laws and property acquired in the course of trade on the faith of the same laws reason draws no distinction. And though in practice vessels with their cargoes found in port at the declaration of war may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. * * *

"War gives the right to confiscate, but does not

itself confiscate the property of the enemy. War gives an equal right over persons and property."

English decisions denying the right to confiscate debts.

The doctrine that the right to confiscate debts still exists as a matter *strictissimi Juris* (although the exercise of it has become unusual and odious, and although no presumption is ever made of the intention of the rulers of a State to enforce it), is certainly controverted by the decisions and dicta of the English courts in Wolff *v.* Oxholme, 6 Maule and Selwyn, 92, and Furtado *v.* Rogers, 3 Bosanquet and Pullen, 191. But so long as the English jurists recognize a right to seize property, it seems impossible to deny a right to confiscate debts. The judgment of the American Supreme Court, in Brown *v.* The United States, appears to be conclusive as to the same principle being applicable to *choses in action*, such as debts, as the courts applied to goods and chattels.

Semble that the American Judges were right.

Authorities of Wheaton and Phillimore.

Reference may be usefully made to the reasoning of Mr. Wheaton about this in his 'Elements,' pt. 4, chap. i., and, above all, to the comments of Sir Robert Phillimore in his third volume, page 720.

Of confiscation of State-debts.

431. One kind of confiscation of debts is specially reprobated, even by those who admit its abstract legality. It is the confiscation of debts due from the belligerent Sovereign State, in its State capacity, to private members of the community with which war has broken out. The attempt of Frederick II. of Prussia, in 1753, to confiscate the money which had been lent to the former sovereign of Silesia by English capitalists, and which Prussia, on Silesia being ceded to her, had undertaken by treaty to pay according to

Prussia and the Silesian Loan.

the contract between the original borrower and the lender, was universally censured by the civilized world. It caused the issue by the English Government of that memorable State-paper which has been so often referred to. The English jurists who prepared that "*Response sans réplique*," as Montesquieu termed it, said truly that "it will not be easy to find an instance where a person has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a Prince [*i. e.* to a Sovereign State] upon the faith of an engagement of honour, because he cannot be compelled like other men in an adverse way in a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that during war they suffered no inquiry to be made whether any part of the public debt was due to subjects of the enemy, although it is certain that many English had money in the French funds, and many French had money in ours." The same course was followed during the subsequent wars of this country with France. The observance of this principle of moral rectitude has been lately extended by England to the case where one belligerent State owes money, not to individual members of the hostile community, but to the hostile State itself. By certain treaties concluded in 1815 and 1831, Great Britain became bound to pay to Russia a moiety of a certain loan which had been made to Holland by Russia. When the war of 1854 of England and her allies against Russia broke out, our Government continued

The great English State-paper.

Case where the hostile State was itself the debtor. Conduct of England as to the Russo-Dutch loan.

to pay regularly to the agents of the Russian Government throughout the war both the interest and the stipulated instalments of the principal of the loan *. On the subject being brought before Parliament the House of Commons sanctioned the continuance of the payments, because "Great Britain being at war with Russia was bound by a regard to national honour to be more than ever jealous of affording the slightest ground for the accusation that she wished to repudiate debts justly contracted with the Power which had become for the time her enemy".

Breaches of the mere modern laws of war in general are only breaches of Comity, or, at the most, of Moral Law.

Semble that cases may exist where such breaches should be treated by third parties as breaches of Positive Law.

432. It is clear that throughout the cases which we have been examining, in all of which the strict right of reviving the old severe laws of war exists, a departure from the milder practice of modern ages can amount to no more than a breach of Comity, or, at the very utmost, to a breach of Moral Law. But cases are imaginable in which the abrupt departure from modern usage might be attended with circumstances of such aggravation and atrocity, as to make the offence one which civilized nations ought to treat as a gross offence against International Law, and in which they would be justified in taking forcible means to repress such outrages †.

Unless third States may and ought to act thus, there can practically be no Positive Law on the subject. For the State which is immediately aggrieved is already at war with the wrong-doer, and can only vindicate

* See the narrative and comment of Sir Travers Twiss, 'Law of Nations,' ed. 2, p. 113.

† See chap. ii. *supra*, p. 44, as to the Solonian maxim of a grievous wrong being a matter of public concern.

itself by Reprisals; indeed the atrocity of the conduct of the offending State may be so heinous that the injured State is not justified in imitating it, and consequently even the check of liability to Reprisals is withdrawn. This important point will be further considered presently; and although, generally speaking, Reprisals may be properly made for all breaches of Moral Right, or of Comity, there are cases in which they would confer no special deterrent security. The Government of one of the greatest Powers of the civilized world has lately asserted in an important official document, that the Laws of War (and indeed that the whole Law of Nations) can have no existence as Positive Law, except so far as some parts have acquired the force of law by means of formal treaties*. In the reply sent by the British Minister to this State-paper of Russia are the following observations:—

Assertions to the contrary in recent State-papers of European Governments.

"Rules of International Law in which the interests of neutrals and belligerents are concerned can be enforced in the last resort by recourse to war.

"In the case, however, of countries already engaged in hostilities, there will be no means, except by reprisals, for either belligerent to enforce upon the other the observance of any set rules.

"It is true that, on the outbreak of war, it would be almost certain that one or other belligerent would appeal to neutral nations against some real, or supposed, infraction of these rules by his opponent. It

* See "Observations by Prince Gortschacow on Lord Derby's Despatch" in Parl. Paper, Miscellaneous, No. 3, 1875.

can, however, scarcely be seriously contemplated that neutral countries should intervene to enforce their observance; and, unless their interference were attended by the exercise of compulsion, in which case the circle of hostilities would soon be indefinitely enlarged, it cannot be supposed that the contending nations would respect it."

433. I find, however, in the Wellington Despatches proof that on one memorable occasion the English Government was prepared to treat gross and cruel breaches of the Laws of War as a *casus belli*, which third States were justified in recognizing, and which required their preventive interference. Of course I do not cite the Duke of Wellington as having personally any jural authority; but his experience in war and statesmanship, and his clear common sense, always entitled his opinions to much consideration; and when he was speaking the judgment and the intention of the British Government, which he then represented at the Court of St. Petersburg, we may be sure that he was expressing opinions formed by our Cabinet, with the guidance and advice of the able Law-officers of the British Crown. At the time which I refer to, Ibrahim Pacha was in Greece, in command [redacted]he vassal auxiliary Egyptian force, which Mehemet [redacted]li, the Pacha of Egypt, had sent to aid the Sultan against the Greek insurgents. Ibrahim Pacha was rapidly reconquering the Morea; and, besides the undoubted fact that the war was carried on between him and his armed opponents in the same merciless spirit which had characterized the contest from its

Per contra, see Wellington Despatches of 1828.

The English Government then considered atrocious violations of Laws of War to justify interference by third Powers.

Charge then made against Ibrahim Pacha of unprecedented and enormous atrocities in conducting the war in the Morea.

commencement, it was imputed to the Egyptian Commander that, in every district and town which he won from the Greeks, he seized the Greek male children for circumcision and forcible conversion to the Mahometan faith, and that he had declared and was beginning to act on a system of transplanting the remains of the Greek population to Egypt, and of repeopling the Peloponnesus with colonies of Copts and Arabs*. Atrocities of similar character may be found in the histories of ancient and of mediæval Oriental conquerors; but even if any thing of the kind had ever been practised by any of the civilized nations of the West, certainly many centuries had passed away without European warfare being sullied by such abominations.

Turkey then within the pale of modern International Law.

It is to be remembered that the Ottoman Turks had, long before the Greek War of Independence, on more than one occasion appealed to the European laws of nations, and had recognized the principles and usages which those laws established†. Even if this had not been the case, it is not likely that civilized European communities would have tolerated the obtrusion into their continent, or into any part of the world where their usages predominated, of such hideous barbarism.

England ready to intervene if these charges were proved.

The Duke of Wellington urged that these charges against Ibrahim Pacha should be investigated; and the Duke maintained that, if true, they gave third States the right to intervene in the war‡. In a memorandum,

* See the third series of the Wellington Despatches, vol. iii. p. 75.

† See instances, beginning in 1737, cited in the note to page 131 *suprà*.

‡ See Wellington Despatches, Third Series, vol. iii. p. 75.

dated March 7, 1829, which he laid before the Emperor of Russia, the Duke, speaking of the intended conduct of the King of England, says, "His Majesty will not suffer any violation of the laws of nations, or of the ordinary rules of war, in carrying on the contest"*. These general words must, of course, be read "*secundum subjectam materiem*," and considered to apply to such enormities as were specially made subjects of complaint against Ibrahim. But the Egyptian Commander denied the truth of these charges. No proof of them was given or found; and consequently other grounds for intervention, besides a general statement that the war was carried on by the Turks in a ferocious manner, were put forward by England and her allies, when intervention actually took place in the October of 1829†.

The Duke's memorandum of 7th March, 1829.

The worst charges denied and not proved.

434. The conclusion as to the whole matter now put forward for consideration is as follows:—When a belligerent State within the pale of International Law atrociously and enormously violates (*immaniter violat*) the restrictive rules as to doing harm to enemies either at the outbreak of hostilities or during their continuance, and whether the restrictive rules so broken by it belong to the restrictive rules which existed in and have existed ever since the old Roman war-code (so far as we can trace it), or whether they form part of so much of the secondary war-rules as has gradually grown up among the nations of civilized Europe and

An atrociously *immanis violatio* of the Laws of War justifies and calls for the sanction of force by third States to vindicate the Laws of War; nothing short of an *immanis violatio* will suffice.

* See Wellington Despatches, Third Series, vol. iii. p. 159.

† For the real and alleged uses of the actual intervention of England, Russia, and France to aid the Greeks, see *suprà*, p. 300 *et seq.*

such other nations as have followed or adopted European International Law (as to which secondary rules there has been no reservation of the strict right to enforce the older and sterner system), then in such a case, but in such a case only, all other civilized States have a right to join in repressing such crimes against the Commonwealth of nations, by remonstrance, by suspension of intercourse with the offending State, and, if such milder means are ineffectual, by the employment of actual force. All the arguments of Grotius, Vattel, and others, that have been quoted in the second chapter of this work *, in support of the doctrine that it is the duty as well as the right of all civilized States to join in repressing atrocious outrages against International Law, apply to this case. The same limitations as to the propriety of interference which have been mentioned respecting the general doctrine apply with peculiar force to this particular branch of it; for there is hardly any other case in which a powerful and unscrupulous third State would have more temptation to interfere in a war under the pretence of humane feeling, but in reality to gratify its own malevolence or to forward its own selfish interest. Armed interposition may be improper in many cases, although deep moral loathing has necessarily been created by unusual severities. There is special need of forbearance on the part of third Powers, when both the Belligerents have been equally cruel (as too often is the case), or where the extra measure of cruelty on one side is evidently attri-

Need of especial caution in the exercise of such right of third Powers to intervene.

* See p. 45 *et seq. suprà* and notes.

butable wholly and solely to the circumstance of that side possessing an extra measure of strength. On the other hand, there may be cases in which the complicity of both sides in horrible violations of International Law may furnish additional reason for interference. Some further remarks on this subject will be given presently when we speak of Reprisals.

435. The general limitation also applies here, that no third State is bound to exercise this right of interference, if by so doing it would bring serious mischief or peril on itself*.

Third State not bound to apply this Sanction if it lead to its own serious injury or peril.

436. Let us apply the Principle, which I have endeavoured to enunciate, to acts which might possibly be committed at the outbreak of a war. I will take the treatment of enemy-subjects who are then found within the territory. I will not assume the realization of the extreme possibility that they might be seized and put to death; but I will assume the realization of the possibility that the old rigid Roman war-right† might be revived, and that such enemy-subjects might be seized and made slaves of. Here is a case in which, if the crime were committed by a State within the pale of modern International Law, such crime would, as it appears to me, justify and require the armed interposition of civilized States in general. It would be different if the State, which seized and enslaved enemy-subjects within its territories, were a

Principle applied to supposed case of selling "*Détenus*" into Slavery.

Distinction here between States which are and States which are not within the pale of modern International Law.

* See the comments of Grotius on Cicero de Officiis, i. 7, referred to in note to page 45, *suprà*.

† See extract from Digest, quoted in note to p. 375, *suprà*.

State which never had directly or by implication acknowledged itself to be bound by our modern International Law. Suppose, for instance, that the Sovereign of some State in the interior of Africa, which British traders and travellers had entered peaceably, were suddenly to declare war against us, and were to seize and enslave those traders and travellers. There would of course be a right for us to obtain by force their release, and to exact satisfaction for the outrage; but other European Powers would have no right to deal with such conduct as a breach of general International Law, and to attack and aid in despoiling the African Sovereign on that account. Africa has not yet adopted the principle which forbids war to be considered as giving a right to enslave captives*; Personal Slavery arising out of forcible captivity still exists there as a normal institution. Conceding to the African (as we must do) the strict right to seize and detain enemy-subjects, we concede to him the right to make slaves of them also. But the case becomes widely different when we suppose the right of seizure and detention to be exercised by a European Power, or any person that is within the pale of modern International Law, such as that Law has grown up among nations of European origin. "Throughout Christendom the old harsh rule has been exploded, and War is no longer considered as giving a right to enslave captives"†. Even the practice of selling into foreign

Kent.

* See passages from Kent, Marshall, and others, cited in notes to p. 275, *suprà*.

† See judgment of Marshall, C. J., cited *suprà*, in note to p. 276. See also notes to p. 262

servitude, or of employing in compulsory hard labour at home, vanquished combatants who have been made prisoners in actual warfare, has ceased for more than two centuries*. To reanimate and to reintroduce into the civilized world any of the long-expired pollutions of Slavery, under the pretence of exercising a right of warfare, would, I apprehend, be regarded as a treason against humanity and civilization, and as a breach of International Law, which all would regard as a Positive Law in every sense of the word, technical as well as colloquial.

As to seizure and embargo of ships and cargoes.

437. I have not paused here to explain or to set forth in detail a State's clear right to seize and to confiscate enemy-ships and their cargoes found in its territorial waters at the outbreak of a War. The Government usually seizes by way of embargo, and then proceeds to confiscate by the action of its Admiralty Courts. No one has ever suggested that any special legislation or declaration of the will of the governing body is necessary to authorize the

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and p. 272. Montesquieu, *Esprit des Lois*, livre xv. ch. ii., refers to opinions that "Le droit des gens a voulu que les prisonniers fussent esclaves, pour qu'on ne les tuât pas." He then says of them, "Ces raisons des Jurisconsultes ne sont pas sensées. Il est faux qu'il soit permis de tuer dans la guerre, autrement que dans le cas de nécessité; mais des qu'un homme en a fait un autre esclave, on ne peut pas dire qu'il ait été dans la nécessité de le tuer, puisqu'il ne l'a pas fait. Tout le droit que la guerre peut donner sur les captifs est de s'assurer tellement de leur personne, qu'ils ne puissent plus nuire. Les homicides faits de sang-froid par les soldats, et après la chaleur de l'action, sont rejetés de toutes les nations du monde."

* More as to this will be stated presently.

exercise of this right. Great care is taken by the American Judges in the case, so often referred to, of "the ship Emulous" and "Brown *v.* The United States," to guard against the supposition that they meant to call in question the State's full power to seize and appropriate property of a maritime description under such circumstances. Yet even here the generosity of modern Statesmanship has in recent wars waived the exercise of unquestionable right.

Generosity of Governments in recent wars.

"The Queen of Great Britain, upon the breaking-out of war with Russia in 1854, in ordering an embargo to be laid upon all Russian vessels that should thereafter enter any British port, harbour, or roadstead, being desirous to lessen as much as possible the evils of war, directed by an Order of the same date, that Russian merchant-vessels, in any ports or places within Her Majesty's dominions, should be allowed six weeks for loading their cargoes and departing from such ports and places, and, further, should not be molested if met at sea by any British cruiser." Great Britain went even further in moderating the exercise of belligerent Right, by directing that "any Russian vessel which should have sailed from a foreign port prior to the date of Her Majesty's Order, bound to any port or place of Her Majesty's dominions, should be permitted to enter any such port or place, and to discharge her cargo and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by a British cruiser, should be permitted to continue her voyage to any port not blockaded." The conduct of the Emperor of the French was dis-

tinguished by the same mildness towards Russian merchants trading in the French dominions; and the Emperor of All the Russias reciprocated the treatment which Russian subjects had experienced in the British and French ports, by proclaiming a similar indulgence to British and French merchants trading in the ports of the Russian Empire."

This indulgence not claimable on the ground of good faith.

Sir Travers Twiss, from whom I have copied this passage, is of opinion that "the conduct of the belligerent Powers on this occasion marks an epoch in the practice of nations in regard to the exercise of belligerent right at the immediate outbreak of war." He considers it to have arisen from the promptings of *good faith*. But this argument about good faith forbidding the seizure, when war breaks out, of things which have been brought to our territory by foreigners during peace-time has been shown to give no absolute immunity even to goods and chattels, or to rights over debts. To the argument that the foreigner brought his property here, or gave credit here on trust that we should protect him, the answer is, that he did so with his eyes open to the risk incurred by him in the event of the outbreak of war; and that, when such risk becomes a reality, there is no breach of trust on the part of the State which enforces it*. Altogether it seems that it would not even be a breach of Comity, if any Power at the outbreak of war were to enforce its right over enemy-ships and cargoes, instead of

The refusal to grant such indulgence not even a breach of Comity.

* See note to Woolsey, p. 204, sect. 118, in answer to the argument about breach of trust put forward by Hamilton (Letters of Camillus) in the 'Federalist,' in 1795.

following the exceptional policy pursued by the three Belligerent Powers in the Crimean War. The exception is not materially strengthened by the fact*, that the Turks and Russians (between whom war had been declared in 1853) had forborne from embargo and seizure of each other's merchant-vessels. If a new epoch in the practice of nations in this respect has really been introduced, the policy or the impolicy of having inaugurated it must be credited to the Ottoman Turks. The Turkish Declaration of War against Russia dated October 4, 1853, after directing that the Russian agents must quit the Ottoman dominions and that commercial relations be suspended, contains the following sentences:—"The Sublime Porte, however, does not consider it just that, agreeably to ancient usage, an embargo should be laid on Russian merchant-vessels. Accordingly they will be warned to proceed within a period to be fixed hereafter to the Black Sea or to the Mediterranean, as they may choose."

The Ottoman Turks set the first example of granting it.

438. I have gone through this discussion as to whether any of the restrictive rules of doing harm in warfare can be in their nature considered as having the Sanction of Physical Force, when speaking of what occurs or may occur at the outbreak of hostilities. I shall have occasion to revert to it when speaking of the Laws of War during hostilities. The Principle, which I have ventured to maintain, is, that though in general the breach of the restrictive rules of Warfare amounts to no more than a breach of

* Halleck, p. 364. Hertslett's Treaties, vol. ii. p. 1176.

Comity, or, at the worst, of Moral Law, there may be outrages committed by Belligerents, which are to be treated as breaches of Positive Law, and in which the punitive or restrictive intervention of Third Powers is justifiable and laudable.

Who are entitled to take part in hostilities?

It has been already repeatedly stated that the outbreak of War places all the members of each belligerent community in a condition of hostility with all the members of the other hostile nation. It is equally certain that this does not give license to all the members of either community to begin destructive or predatory attacks on the persons or property of the enemy. The general authority to use violence, which common Declarations or Manifestoes of War put forth by the Sovereign Power in the State purport to bestow, must (in the case of a civilized State) be interpreted with reference to the laws and usages of modern International Law*. This limitation is sometimes set out in the Declaration or Manifesto itself. This is done (I believe) most fully in the Declaration of War issued by the Spanish Government against France, dated Seville, 23rd of April, 1823. The Spanish Sovereign there says (after reciting the fact of the invasion of Spain by a French army), "I have resolved to declare War, as in fact I now do declare it, against France. Wherefore I charge and command all the competent authorities to carry on hostilities by sea and by land against France, with all the means in their power consistently with the law of nations"†.

How to interpret the general authority for violence which is given by an ordinary Declaration or Manifesto of War.

Precision of the Spanish Declaration of War with France in 1823.

* See Vattel, livre iii. sect. 226, 227, 228.

† Hertslett, p. 697.

Wheaton cited.

Not to multiply authorities needlessly, I will set out and adopt what is laid down by Wheaton on this subject. He says that those hostilities only are internationally lawful "which are carried on by those who are authorized, either expressly or by implication, by the State. Such are the regularly commissioned naval and military forces of the nation, and all others who are summoned to its defence, *or who are spontaneously defending themselves in case of urgent necessity without any express authority to that effect*"*.

This last part of Wheaton's rule is very important, as we shall see when we come to consider the rights and duties of the inhabitants of invaded districts.

Consider first the case of hostile operations between regular forces on both sides.

439. To take the simplest case first, we will begin with the rules of warfare as waged among civilized nations by the regularly commissioned naval and military forces of one Belligerent State against the regularly commissioned naval and military forces of the other Belligerent State.

Poison and assassination forbidde The use of them would justify interposition by third States.

We have already seen that among the means of doing injury to an enemy there are several which have been regarded as unlawful from, at least, the Roman times†. Such are poison and assassination. Vattel gives it as his clear judgment that the resort to these execrable practices would entitle and require all nations to regard those guilty of them as common

* Wheaton's 'Elements.' Quatrième Partie, ch. ii. tome ii. p. 8.

† See Grotius, lib. iii. c. iv. sect. 15, 18, &c. Vattel, livre iii. ch. viii. sect. 155. Martens, p. 281.

enemies of the human race, and to unite their forces in order to repress such enormities*. It has also been always held to be a violation of the Laws of War to poison fountains and other supplies of water, though they may be otherwise rendered useless or obstructed †. Martens adds that "it is also against the laws of war knowingly to send among the enemy persons attacked with the plague, or any other contagious disease"‡. The same prohibition has long been considered by all civilized nations to extend to the use of poisoned weapons. There have been of late years International agreements entered into between nearly all the chief powers of the civilized world, with a view of preventing the use of implements of warfare which inflict unnecessary torture and destruction on enemies—that is to say, which are calculated to do your adversary more personal harm than is required for the legitimate purpose of disabling him from continuing the conflict with you§. As Vattel puts the question, "Il faut bien que vous frappiez votre ennemi, pour surmonter ses efforts: mais s'il

As to poisoning or obstructing supplies of water.

Spreading infectious diseases.

As to poisoned weapons, and as to implements of warfare which are designed to torture and kill, and not merely to disable from further conflict.

The Convention of St. Petersburg.

Vattel cited.

* Vattel, sect. 155, near the end.

† Grotius, lib. iii. ch. iv. sect. 16, 17. Martens, p. 281.

‡ Martens, p. 281, note. Bluntschli, p. 314.

§ See in 3 Hertslett, p. 1860, the Convention of St. Petersburg of 11th Dec. 1868, renouncing the use of explosive projectiles below a certain weight. The recital reprobates "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable." This Convention was agreed to by all the European Powers except Spain; and it was also signed by the representatives of Persia and of Turkey.

The conventions respecting the treatment of wounded enemies, and similar topics, will be spoken of presently.

est une fois mis hors de combat, est-il besoin qu'il meurt inévitablement de ses blessures?"*

As to right to quarter. Roman practice.

440. As we have seen, according to the strict old rules of Roman warfare, the conqueror had full right to take the lives of the conquered; but if he once spared and received them as prisoners of war, it was regarded as a breach of the laws of war to slaughter them wantonly afterwards. A milder system has long grown up and been recognized among civilized nations. The modern theory and practice are well stated by Martens, in a passage which I will quote.

Modern practice.

General principles cited from Martens.

"From the moment we are at war all those who belong to the hostile State become our enemies, and we have a right to act against them as such; but our right to wound and kill being founded on self-defence, or on resistance opposed to us, we can with justice wound or take the life of none except those who take an active part in the war; so that (1) children, old men, women, and in general all those who cannot carry arms, or who ought not to do it, are safe under the protection of the Law of Nations, unless they have exercised violence against the enemy; (2) retainers to the army, whose profession is not to kill or directly injure the enemy, such as surgeons, chaplains, and, to a certain degree, drummers, fifers, trumpeters†, &c., ought not to be killed or wounded deliberately; (3) soldiers, on the contrary, being looked upon as ever ready for defence or attack, may

* Vattel, livre iii. ch. viii. sect. 156.

† These last three exceptions are by no means so clearly right as the two first-mentioned ones.

at any time be wounded or killed, unless when it is manifest that they have not the will or have lost the power to resist. When that is the case, when wounded, surrounded, or when they lay down their arms and ask for quarter—in short, from the moment they are reduced to a state in which it is impossible for them to exercise further violence against the conqueror, he is obliged, by the Laws of War, to spare their lives; except, however, (1) when sparing their lives be inconsistent with his own safety; (2) in cases where he has a right to exercise the *talio* or to make reprisals, when the crime committed by those who fall into his hands justifies the taking of their lives"*.

441. The authorities on the subject are numerous; and there is little, if any, discrepancy between them. I shall chiefly adopt the words of General Halleck, who combined the theoretical and practical qualifications of Soldier, Statesman, and Jurist†.

Halleck quoted.

"As the right to kill an enemy in war is applicable only to such public enemies as make forcible resistance, this right necessarily ceases so soon as the enemy lays down his arms and surrenders his person. After such surrender the opposing belligerent has no power over his life, unless such new rights are given

* Martens, p. 282.

† Reference may be made to (*inter alios*) Vattel, liv. iii. ch. viii. sect. 139, 140; Montesquieu, *Esprit des Lois*, liv. x. ch. iii., and liv. xv. ch. ii.; Wheaton's 'Eléments,' pt. iv. ch. ii. sect. 2; Phillimore, vol. iii. p. 143; Bluntschli, p. 326, sect. 578; Calvo, vol. i. p. 110.

There is a remarkable passage in Mr. Kinglake's 'History of the Crimean War,' vol. i. p. 278, as to the "gradations by which slayers of vanquished men may be distinguished."

by some new attempt at resistance. By the present rules of International Law quarter can be refused the enemy only in cases where those asking it have forfeited their lives by some crime against the conqueror under the laws and usages of war "*.

When is the Right to Quarter lost?

442. What are the crimes against the modern law-code which thus deprive unsuccessful combatants of the normal right to quarter? The question is probably not susceptible of an exhaustive answer. But it is of too much practical importance to be passed over.

Injustice of the enemy's cause not enough.

The refusal of quarter certainly cannot be justified by our assertion, however sincere, that the enemy has been fighting in an unjust cause†. More definite reasons are necessary; and they must be reasons based on the adversary's conduct of the war, and not on his having entered into the War.

Case of enemy's general refusal to grant quarter.

If the enemy's Government or the commanders of their forces have given general orders to refuse quarter, the prevalent opinion seems to be, that such a general order, even if executed, does not justify us in retaliating by similar atrocity. Certainly all writers concur in eulogizing those who in such a case continue to grant quarter‡. Thus, not only English but foreign historians give merited praise to the Duke of York for his conduct in this respect when commander of the

Conduct of the British in the Revolutionary War, after the French Convention had ordered their armies to give no quarter.

* P. 429.

† "On ne peut jamais refuser de faire quartier à l'ennemi sous la prétexte qu'on est convaincu de l'injustice de la cause qu'il soutient" (Bluntschli, p. 328). It is unnecessary to multiply quotations from authorities on a point as to which there is no dispute.

‡ "If the enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceeds these

British and Allied forces in the Netherlands, in the war against the French in 1794. The National Convention (which then was the sovereign power in France) issued a decree on the 30th of May in that year, that the French armies should give no quarter to English or Hanoverians; and another decree was put forth, which directed that if the hostile garrisons (called in the decree "les troupes des tyrans coalisées") of certain towns did not surrender in twenty-four hours after summons, they should be put to the sword. The Duke of York, as commander of the English and Hanoverians, replied to the first of these decrees by an order deservedly called "a noble document," in which he directed that "all French captives should be treated with the same humanity as before." The officer in command of the garrison of Condé* (one of the garrisons menaced by the French Govern-

Noble reply of the Commandant of one of the menaced garrisons.

extreme rights and becomes barbarous and cruel in his conduct, we cannot, as a general thing, follow and retort upon his subjects by treating them in like manner. * * * Suppose an enemy should massacre all prisoners of war, this would not afford a sufficient justification for the opposing belligerent to do the same. Suppose our enemy should use poisoned weapons, or poison springs and food, the rule of reciprocity would not justify us in resorting to the same means of retaliation" (Halleck, 445). "Comme un Prince, ou son Général, est en droit de sacrifier la vie de ses ennemies à sa sûreté et à celle de ses gens, il semble que, s'il a affaire à un ennemi inhumain, qui s'abandonne souvent à de pareils excès, il peut refuser la vie à quelques-uns des prisonniers qu'il fera; et les traiter comme on aura traité les siens. Mais il vaut mieux imiter la générosité de Scipion," &c. (Vattel, livre iii. ch. 8, p. 142).

* I have always thought that the conduct of that much calumniated body of men, Evans's Spanish Legion at Irun in

ment) issued an order of the day, which stated with equal dignity and truth, that "No nation has a right to decree the dishonour of another nation." Whenever this subject is mentioned, it ought always to be added, to the credit of the French armies and of the French people generally, that the French officers and soldiers in no instance carried these savage directions of their rulers into execution; and on the 30th of December in the same year (being after the fall of Robespierre, St. Just, and their band of fierce fanatics), the National Convention repealed the order to give no quarter. The repealing decree stated in its preamble (among other reasons), that the decree for-

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1837, surpassed in magnanimity and generosity that of the British troops in Holland in 1794. Don Carlos (against whom the British force under General Evans was, with the sanction of their own Government, aiding Queen Christina in the contest for the crown of Spain) had issued a decree (infamous in history as the Durango Decree), by which the Carlist troops were ordered to give no quarter to the English auxiliaries. This decree had not been left inoperative, as had been the case with that of the French Convention in 1794; but many of Evans's men had been massacred on the battlefield in consequence of it, and many had been still more cruelly put to death in cold blood some days after their capture. On the 15th of May, 1837, the British Legion fought a desperate and sanguinary action with the Carlists at Irun, from which place the Legion had previously been repulsed with severe loss. The English at last prevailed, and a large number of the Carlists were cooped up and surrounded by the victors in the town-hall and market-place of Irun. No quarter was expected by the Carlists; it was asked for by very few, but it was given to all. General Evans and his officers exerted themselves nobly and successfully to restrain the natural rage of their men against such enemies, and not a single Carlist's life was sacrificed after resistance had ceased.

bidding quarter was "contrary to the Law of Nations and the Laws of War."

As to a corps or crew that gives no quarter.

443. If any particular troop, or corps, or garrison, or ship's crew have, when successful, refused to grant quarter, or if they have, by hoisting the black flag, or other means announced their intention to refuse it, they unquestionably forfeit all right to it for themselves.

The same is the case where the vanquished troop, corps, garrison, or crew has, as a body, been guilty of very atrocious massacres, or treacherous cruelties, or violation of terms of truce or surrender, or of parole. But even here means should be taken, if possible, to distinguish between degrees of guilt; and it is just as well as humane to treat the common soldiers, who acted under orders, differently from their leaders and officers who gave such orders*.

* Bluntschli, p. 327. "Un corps d'armée n'a pas le droit de déclarer qu'il ne fera ou n'acceptera pas de quartier. Ce serait un vrai assassinat. Les troupes qui déclarent ne pas vouloir faire de quartier, renoncent par là à ce qu'il leur soit fait quartier à elles-mêmes."

Lieber, in the Instructions which he drew up for the American armies, directs as follows:—

"It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has a right to declare that it will not give, and therefore will not expect quarter.

"All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

"Troops who fight in the uniform of their enemies without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

"The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy

As to individuals who have atrociously violated the Laws of War; and as to Deserters.

444. With regard to putting to death individuals who have been personally guilty of such crimes and offences, the case is clearer still. So also "fugitives and deserters found by the victor among his enemies are guilty of a crime against him; and he has an undoubted right to punish them, and even to put them to death. They are not properly considered as military enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an

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in battle, is an act of perfidy, by which they lose all claim to protection by the laws of war.

"Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may nevertheless be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter."

Among the Rules recommended by the Committee at the Brussels Conference are the following:—

"Art. 12. The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy.

"Art. 13. According to this principle are strictly forbidden—

(*a*) The use of poison or poisoned weapons.

(*b*) Murder by treachery of individuals belonging to the hostile nation or army.

(*c*) Murder of an antagonist who, having laid down his arms, or having no longer the means of defending himself, has surrendered at discretion.

(*d*) The declaration that no quarter will be given.

(*e*) The use of arms, projectiles, or substances [*matières*] which may cause unnecessary suffering, as well as the use of the projectiles prohibited by the Declaration of St. Petersburg in 1868.

(*f*) Abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention."

offence against the State; and their enlistment with the enemy cannot obliterate that character, or exempt them from the punishment they have deserved. They are not protected by any compact of war, as a truce, capitulation, cartel, &c., unless specially and particularly mentioned and provided for. They are not military enemies in the general meaning of that term; nor are they entitled to the rights of ordinary prisoners of war, either under the law of nations, or by the general terms of a special compact or agreement. But where stipulations of amnesty are introduced into such compacts in such terms as to include such fugitives and deserters by fair and proper intendment, good faith requires that all promises of this kind be honestly and fairly carried into effect. A violation of such agreements is infamous. Amnesties of this character are very common where the principal war is accompanied with insurrections and civil commotions, involving questions of personal duty and allegiance "*.

445. There has been as to these things little or no discrepancy between recent and more ancient usages. I come now to a matter as to which modern practice has been greatly changed from that which formerly prevailed, and which was thought by high authorities, even so late as the present century, to be permissible.

Old denial of quarter to weak garrison after unduly prolonged defence.

446. "It was an ancient maxim of war that a weak garrison forfeits all claim to mercy on the part of the conqueror when, with more courage than prudence, they obstinately persevere in defending an ill-fortified place against a large army, and when in re-

* Halleck, p. 443.

fusing to accept of reasonable conditions offered to them, they undertake to arrest the progress of a power which they are finally unable to resist. But though sometimes practised in modern warfare, it is generally condemned as contrary to humanity and inconsistent with the principles which amongst civilized and Christian nations form the basis of the laws of war." I quote from General Halleck*, who, in writing this, was chiefly following Vattel. Vattel, in the 3rd book of his work†, expresses his surprise that such a barbarous rule of war should ever have been thought of; but he attests its prevalence in the century before that in which he was writing; and he adds that it was not universally regarded as false and unjust even in his own day. He rightly rejects the pretext on which it was sometimes sought to justify such severities, namely the allegation that the obstinate defence of a fortress, especially of a weak one, only causes a waste of bloodshed. As he truly observes, "that defence may save the State by arresting for a time the progress of the enemy; and, moreover, the valour of the garrison may make up for the deficiency of the works."

Such practices now condemned.

Vattel's authority.

447. There is a special case, arising out of the incidents of a siege, in which, according to some authorities, the garrison forfeit the now customary right to quarter. It is when the operations of the besiegers have been so far successful that a practicable breach has been effected in the defences of the body of the place, so that an assault may be made on it with reasonable certainty

Case of garrison that refuses to surrender and stands an assault after a practicable breach has been made.

* P. 440. † Chap. 8, sect. 143.

of success, according to fair engineering and military calculations. If the garrison then reject a summons to surrender, and determine to stand the chances of an assault, they must (in the opinion of some high authorities) stake their lives on the event; and they have no right to throw down their arms and claim quarter, if the breach is once victoriously surmounted by the columns among which they have been dealing down slaughter during the desperate struggle by which a well-contested siege is usually terminated. It is to be remembered that while the assault is proceeding the fire of the besiegers is almost always unavoidably suspended*, and the defending soldiery fight in comparative security. Quarter is said to have been refused after successful assaults to garrisons under such circumstances in several sieges during the present century; and there is a State-paper by the Duke of Wellington, in which he speaks of such refusal as justifiable, and he mentions instances in which he might himself have practised it, though it is gratifying to be able to add that he forbore to do so. For, clearly, the same principle which justifies the commandant of an originally feeble fortress in defending it, gives also a justification to the commandant of a fortress which has been enfeebled by the besiegers' fire, in prolonging his resistance to the utmost. It is the principle of doing his duty to the utmost in order to repel, or at least to retard, the hostile progress of his country's enemies. And it is to be remembered that assaults on fortified places,

Opinion of the Duke of Wellington.

His practice more generous than his theory.

The Rule of Mercy is the true rule.

* What happened at the second siege of St. Sebastian in 1813 is almost a solitary exception.

however ably the engineers and artillerists may have breached the works, and however boldly the infantry columns may follow their forlorn-hopes in the rush upon their expected prize, are not unfrequently repulsed; and the repulse may save the fortress. To go no further than the Peninsular War itself, our forces were defeated in their first assault on St. Sebastian. At Burgos in 1812 we made no less than five unsuccessful attacks; and the Duke was finally obliged to abandon the siege and retreat*.

What persons are liable to be treated as Prisoners of War.

448. We have considered the subject of what persons have a right to be treated as Prisoners of War; it remains to consider what persons are liable to be so treated. It is a liability extending beyond those who are members of the military and naval forces.

Lieber's Definition.

According to Lieber (whose authority as to the

* The paper to which I refer is a letter from the Duke of Wellington to the Right Hon. George Canning, dated London, 3rd Feb. 1820. It is published in the third series of the Wellington Despatches, vol. i. p. 80. It is as follows:—

"I believe it has always been understood that the defenders of a fortress stormed have no right to quarter; and the practice, which has prevailed during the last century, of surrendering a fortress when a breach was opened in the body of the place and the counterscarp was blown in, was founded upon this understanding. Of late years, however, the French have availed themselves of the humanity of modern warfare, and have made a new regulation, requiring that a breach should stand one assault at least. The consequence of this regulation was to me the loss of the flower of the army in the assaults of Ciudad Rodrigo and Badajos. I certainly should have thought myself justified in putting both garrisons to the sword; and, if I had done so to the first it is probable that I should have saved 5000 men in the assault of the second. I mention this

laws of actual warfare I regard as the very highest*), "A Prisoner of War is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation. All soldiers, of whatever species of arms, all men who belong to the rising *en masse* of the hostile country, all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for, all disabled men or officers on the field or elsewhere, if captured, all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such are exposed to the inconveniences as well as entitled to the privileges of a prisoner of war. Moreover citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, or contractors, if captured, may be made prisoners of war and be detained as such.

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in order to show you that the practice of refusing quarter to a garrison which stands an assault is not a useless effusion of blood."

According to the French Articles of War, "The Military Law condemns to capital punishment every commandant who gives up his place without having forced the besiegers to pass through the slow and successive stages of a siege, and before having repulsed at least one assault on the body of the place by practicable breaches." Quoted in Mr. Sutherland Edwards's book, 'The Germans in France,' p. 180.

The subject of allowing soldiery to sack a captured town will be spoken of presently, when we are considering the liabilities and rights of Non-Combatants.

* See a brief biographical notice of Lieber in the note to page 81, *suprà*.

"The monarch and members of the hostile reigning family, male or female, the chief and the chief officers of the hostile Government, its diplomatic agents, and all persons who are of particular and singular use to the hostile army or its Government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's Government, prisoners of war."

449. With respect to the treatment of prisoners of war, I have in a preceding chapter* spoken of the

* See p. 273 *suprà et seq.* and notes. Mr. Dudley Field, in his 'Outlines of an International Code,' p. 516, mentions *inter alios* the following as "persons who may be taken prisoners:"—those who are connected with the operations of the military forces, whether with or without the authority of the State; the sovereign or the chief executive officer of the enemy or his allies; officers of the civil government of the enemy, whose functions directly subserve a military purpose, and persons of whatever character found on the field of battle" [of course, surgeons and other attendants on the wounded would be exempt]. Bluntschli (p. 340, sect. 584, 2) states that "On a le droit d'arrêter les personnes qui, sans appartenir à l'armée et tout en remplissant des fonctions pacifiques, sont dangereuses pour les troupes d'occupation: ainsi les journalistes, dont les opinions sont hostiles, les chefs de parti pourront être faits prisonniers, au même titre que les officiers de l'armée, parce qu'ils augmentent la somme des forces dont l'ennemi dispose, et préparent des difficultés ou des embarras aux autorités militaires. Les opinions manifestement hostiles autorisent à s'emparer de la personne de ceux qui les professent. Les non-combattants attachés à l'armée, et même les personnes qui suivent l'armée sans en faire partie (correspondants de journaux, fournisseurs, etc.), peuvent être faits prisonniers, lorsque le corps, auquel ils se sont joints, est fait prisonnier, ou lorsqu'on s'empare d'eux pendant une poursuite. En se joignant à un corps d'armée, ces personnes courent les mêmes dangers que lui, et ne peuvent pas réclamer si elles sont traitées en ennemis, —provisoirement du moins,—

old stern principle of the antique code of war, according to which the captive was regarded as the lawful booty of the victor, who had spared the life forfeited by defeat, and which universally sanctioned the detention of prisoners of war as slaves, or their sale as slaves for the pecuniary benefit of the conquerors. It has been stated also (in the words of the American Chief Justice Marshall) that "throughout Christendom this harsh rule has been exploded, and War is no longer considered as giving a right to enslave captives." But it has been mentioned also that in many parts of the world the old theory and practice in this respect continue, and that when cases come before the tribunals

Reference to old war-rules as to victor's right to slay or to enslave.

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et si on les fait prisonniers. On n'est cependant autorisé à les retenir en qualité de prisonniers de guerre, que lorsque leur présence dans le camp ennemi constitue un appui pour ce dernier, et un danger pour la puissance qui les a capturés. L'Art. 50, des instructions Américaines accorde, par contre, aux autorités militaires le droit de s'emparer de ces personnes. Ces principes seront spécialement applicables aux employés de l'administration de l'armée ennemie et parfois aussi aux correspondants de journaux étrangers.

"Les souverains et les personnes revêtues d'un caractère diplomatique peuvent être faits prisonniers de guerre, s'ils dépendent de la puissance ennemie ou de ses alliés, ou s'ils ont personnellement pris part aux opérations militaires. La capture du souverain ennemi ou du ministre des affaires étrangères est souvent un moyen heureux d'obtenir promptement une paix favorable. Il n'existe pas de motif de remettre ces personnes en liberté; comme ce sont elles qui ont amené, ou tout aux moins décidé la guerre, il est juste qu'on les en rende responsables et qu'elles en partagent les dangers. Les chefs politiques et les préfets des provinces seront également plus exposés au danger d'être faits prisonniers que les employés administratifs inférieurs, les juges, les conseillers municipaux ou les instituteurs."

of civilized European States and of States formed by European colonists as to the exercise of this old right to make War the parent of Slavery, the legal right to do so is still reluctantly admitted when it has been enforced by nations who have never renounced that right by treaty and have not generally adopted the modern International Law of Christian Europe and of Europeanized America*.

The old practice of compelling war-captives to pay ransom.

Another practice which was almost universal in Europe (as well as in other regions) during the times which we are accustomed to regard as the brilliant ages of chivalry, is now rejected as barbarous and iniquitous, and as fitted only for brigands and pirates. I mean the custom according to which the captor of a prisoner of war was held to have a right to exact ransom from his captive, and could sell his right to ransom and his right to imprison the living pledge till the money was paid; so that war-captives became marketable commodities, and the hope of obtaining them operated as no slight motive in inducing valorous knights and barons bold to approve of a war, and to render personal service in a campaign. In this, as in many other matters, we may adopt the words of Sthenelus in the Iliad†, and assert that we are better than our sires. Many may be surprised to find, down to how late a period war-captives have been sold into servitude, or imprisoned and kept to painful and debasing

* See the American case of the 'Antelope,' Wheaton, S.C. Reports, p. 120, cited in note to page 275, *suprà*.

† 'Ημεῖς τοι πατέρων μέγ' ἀμείνονες εὐχόμεθ' εἶναι.

labour by States that boasted most highly of their refinement and civilization*.

Vattel has in this, as in many other matters, the honour of having been the first to point out clearly the true and just principle that ought to be followed. He says, "One has the right to make sure of the safe custody of prisoners, and for that purpose to confine them, and even to use bonds, if there is cause for

True principle of treatment of prisoners of war set forth by Vattel. They are to be detained for security, not for punishment.

* The rules and practices as to ransoms of prisoners are fully described by Mr. Plumer Ward in his 'Treatise on the Law of Nations as existing before the time of Grotius.' With respect to the late date, down to which oppressive severity towards Prisoners of War was practised, I will refer to Manning's 'Law of Nations' (late edition by Professor Sheldon Amos, p. 216), and Sir Travers Twiss in his 'Law of Nations,' 2nd edit. p. 351. "Notwithstanding the mitigating influences which the profession of the same religion by both the belligerent parties, and more especially the profession of the Christian religion, has been found in practice to exercise over the conduct of hostilities, it has been found necessary, within so recent a period as the commencement of the 17th century, to stipulate by treaties that prisoners of war should not be detained as galley-slaves after the war had terminated. Thus it was stipulated in the Treaty of 1604, between England and Spain, that prisoners of war on either side should be released, although they had been condemned to the galleys. An article in similar terms was introduced into the Treaty of 1630 between England and Spain. It would appear from the 101st article of the Treaty of the Pyrenees, concluded in 1659 between France and Spain, that at that time the practice of condemning prisoners of war to the galleys was not altogether abandoned. This practice, however, was evidently becoming obsolete before the conclusion of the 17th century; for we find that when Count Solmes, who was serving under William of Orange in Ireland in 1690, threatened to deport his prisoners as slaves to America, the Duke of Berwick threatened to retaliate by sending his prisoners to the galleys in France. Byntkershoek, in commenting on the conduct of

fearing they will rise on you or that they will attempt an escape; but nothing can justify the infliction of harsh treatment on them, at least unless they commit some act of personal culpability towards those who have them in their power"*.

Agreement of modern authorities that Prisoners of War may be required, under certain conditions, to work for their own support.

With respect to modern customary Law on the subject, I will continue to quote Lieber (as, in general, the highest single authority), adding extracts from, or giving references to, others when necessary. It will be seen that there is a general concurrence of recent authorities as to the lawfulness of compelling prisoners of war to work for their maintenance if their own

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the Dutch in 1602, in liberating certain prisoners of war whom their friends would not ransom, observes that it would have been foreign to the manners of that age (*moribus, quæ nunc frequentantur, alienum*) to have put them to death, or to have sold them as slaves, although he remarks that the Dutch are accustomed to sell as slaves to the Spaniards all prisoners of war belonging to Algiers, Tunis, or Tripoli, and that the States-General had ordered their Admiral in 1661 to sell as slaves all pirates whom he might capture at sea. From a proclamation of Charles I., of 23rd of July, 1628, we may infer two facts:—first, that a practice of exchanging prisoners during war was growing up; and secondly, that the private interest of the actual captor in his prisoners had not been entirely divested at that time, as we find all prisoners brought into the kingdom by private men were to be kept in prison at the charge of the captors until they should be delivered by way of exchange or otherwise."

* Livre iii. chap. 8, sect. 150. In sect. 153 he categorically disproves the right to enslave them. In sect. 154 he condemns the claim of the captors to exact ransom. See also Montesquieu, *De l'Esprit des Lois*, livre xv. chap. 11, "Tout le droit que la guerre peut donner sur les captifs est de s'assurer tellement de leur personne, qu'ils ne puissent plus nuire."

State fail to supply the means for maintaining them, which most writers, from Vattel downwards, consider that it ought to do. It is stated in some memoirs of Napoleon that doubts were expressed by certain French Jurists, as to the international lawfulness of a design which the Emperor once formed of allotting some of his numerous war-captives to the French landowners and farmers as agricultural labourers. And undoubtedly the compulsory exaction of labour from war-prisoners may be made the instrument of great oppression, and of the gratification of malignant and avaricious feelings on the part of their custodians, unless strict and generous caution is exercised in enforcing no kind of toil which is usually regarded as degrading or which is specially loathsome, and also unless regard is paid to the rank and previous social station of each prisoner. But if these precautions are duly attended to, there seems to be no objection to requiring a captive to work for his own support. The opportunity to work should always, when practicable, be given. The profits of the work, when not required for the worker's subsistence, may be properly employed for the provision of comforts for him beyond the prison allowance, or in forming a fund, of which he will have the benefit if set free by exchange during the war, or when liberated by mutual release of prisoners on the conclusion of peace. It has been truly said, that not even the battlefield with its heaps of the dying and the dead, is a sadder spectacle than are military gaols and prison-hulks with their hundreds and thousands of human beings confined in compul-

Need of strict precautions in practising this right.

The opportunity of working should always be offered. The Prisoner to have the benefit of the proceeds of voluntary work.

sory inaction, in all the miseries and evils, moral as well as physical, which such a state of existence engenders.

Lieber's rules.

Lieber lays down the rules as to the treatment of Prisoners of War as follows:—"A prisoner of war is subject to no punishment for being a public enemy; nor is any revenge to be wreaked on him by the intentional infliction of any suffering or disgrace by cruel imprisonment, want of food, by mutilation, death, or other barbarity.

"A prisoner of war remains answerable for his crimes committed against the captor's army before he was captured, and for which he has not been punished by his own authorities.

"All prisoners of war are liable to the infliction of retaliatory measures.

"A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom is to be paid by a prisoner of war to his individual captor or to any officer in command. The Government alone releases captives, according to rules prescribed by itself.

"Prisoners of war are subject to confinement or imprisonment, such as may be deemed necessary on account of safety; but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity, according to the demands of safety.

"Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

"They may be required to work for the benefit of the captor's Government, according to their rank and condition.

"A prisoner of war who escapes may be shot or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

"If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

"If prisoners of war, having given no pledge nor made any promise on their honour, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

"Every captured wounded enemy shall be medically treated according to the ability of the medical staff.

"Honourable men when captured will abstain from giving to the enemy information concerning their own army; and the modern law of war permits no longer the use of any violence against prisoners in order to

extort the desired information, or to punish them for having given false information"*.

Rules proposed at the Brussels Conference.

The 23rd, 24th, 25th, 26th, and 27th Articles of the Rules recommended by the Committee at the Brussels Conference declared that

"Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals or of the corps who made them prisoners.

"They should be treated with humanity.

"Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them.

"All their personal effects, except their arms, are considered to be their own property.

"Prisoners of war are liable to internment in a town, fortress, camp, or in any locality whatever, under obligation not to go beyond certain fixed limits; but they may not be placed in confinement (*enfermés*) unless absolutely necessary as a means of security.

"Prisoners of war may be employed in certain public works which have no immediate connexion with the operations on the theatre of war, provided the employment be not excessive nor humiliating to their military rank, if they belong to the army, or to their official or social position.

"They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work.

"The pay they receive will go towards ameliorating

* Lieber's 'Instructions for the American Armies.'

their position, or will be placed to their credit at the time of their release. In this case the cost of their maintenance may be deducted from their pay.

"Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of the war.

"The Government in whose power are the prisoners of war undertakes to provide for their maintenance.

"The conditions of such maintenance may be settled by a mutual understanding between the belligerents.

"In default of such an understanding, and as a general principle, prisoners of war shall be treated, as regards food and clothing, on the same footing as the troops of the Government who made them prisoners.

"Prisoners of war are subject to the laws and regulations in force in the army in whose power they are.

"Arms may be used, after summoning, against a prisoner attempting to escape. If retaken, he is subject to summary punishment (*peines disciplinaires*) or to a stricter surveillance.

"If, after having escaped, he is again made prisoner, he is not liable to any punishment for his previous escape"*.

The Commander of an army in the field or in

* Many of these rules recommended at the Brussels Conference, but not all, are taken from Bluntschli (sections 601, 602). He does not allow the infliction of punishment on a Prisoner of War for an attempt to escape. The rules laid down by Heffter (sections 128, 129) are much to the same effect. So are those recommended in Mr. Dudley Field's International Code, par. 804–815. And see General Halleck, pp. 434–437.

siege operations, to whom enemies surrender or have surrendered, or with whom they negotiate for surrender, may waive the right to make them actual prisoners of war, or to detain them as such; and he may in doing this impose conditions on them: but the nature of such conditions is not unlimited. And so the State which has prisoners of war in its custody may during the war release them on conditions. The enemy, who thus avoids or is released from captivity upon conditions is, as a rule, bound to observe them; but it is not every kind or degree of condition that is lawful and obligatory. By the very nature of all such cases the bargaining parties do not deal on equal terms. The party granting the conditions has the vantage-ground of superior power; the party applying for them is under the pressure of distress and need. This circumstance will not of itself vitiate all such contracts, on the ground of their being made under duresse. There is a distinction here, as in other matters*, between public and private contracts, a distinction arising out of general utility. If the doctrine of the general invalidity of contracts under duresse were to be admitted into the jurisprudence of Belligerency, the powerful party would be driven to the adoption of harsh and perhaps sanguinary measures, out of regard to their own security. But the prevalent party has no right to impose conditions which are dishonourable to those who accept them, or that are essentially contradictory to their duties towards their own country. The most common condi-

Of releasing prisoners on conditions.

Not every kind of condition lawful.

Duresse alone does not vitiate such contracts.

There is no right to impose dishonouring or traitorous conditions.

* See p. 41, *suprà*.

tion is, that the released parties shall not bear arms again against the State of their captor for some specified period, or until the end of the war. The captor may lawfully impose this stipulation; "but he cannot require them to renounce for ever the right to bear arms against him; nor can they on their part enter into any engagements inconsistent with their character and duties as citizens and subjects; such engagements made by them would not be binding upon their sovereign or state. The reason of this limitation is obvious: the captor has the absolute right to keep his prisoners in confinement till the termination of the war; but on the conclusion of peace he would no longer have any reasons for detaining them. They therefore have the right to stipulate for their conduct during that period, but not beyond the time when they would have been released had no agreement been entered into. Nor can the captor generally impose conditions which extend beyond the period when the prisoners would necessarily be entitled to their liberty. Beyond this their services are due to, and at the disposition of, the State to which they owe allegiance; and they have no power to limit them by contracts with a foreign power"*.

Usual and lawful conditions.

This mode of release is usually termed "Release by Parole," or "Paroling," in contradistinction to release by exchange. In general "commissioned officers only are allowed to give their Parole; and they can give it only with the permission of their superior as long as a superior is in reach."

Who may be paroled.

* Halleck, p. 433.

"No non-commissioned officer or private can give his parole except through an officer. Individual paroles, not given through an officer, are not only void, but subject the individual giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

"No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners with a general declaration that they are paroled is permitted, or of any value.

"In capitulation for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war unless exchanged.

"The usual pledge given in the parole is not to serve during the existing war unless exchanged.

Extent of the pledge not to serve.

"This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

"If the Government does not approve of the parole, the paroled officer must return to captivity; and should the enemy refuse to receive him, he is then free of his parole.

"A belligerent Government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

"No prisoner of war can be forced by the hostile Government to parole himself; and no Government is obliged to parole prisoners of war, or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent"*.

Paroling not compulsory on either side.

450. What has been stated as to a Belligerent State not being bound to allow paroling, applies to the allowance of exchanges. The increased humanity of modern war-usages creates a natural expectation that both parties to a war will concur in mitigating, as far as possible, the sufferings which it brings upon individuals and their families, and that, with a view to such mitigation, the granting of paroles and the allowance of exchanges will be encouraged and facilitated. But with regard to exchanges, as Vattel long ago pointed out†, there may be crises in a war, in which a bartering of captive troops would be so manifestly to the advantage of one party that the other may

Exchanges not compulsory.

* Lieber's Instructions, paragraphs 127 to 133.

† Livre iii. chap. 8, sect. 153.

reasonably, as well as lawfully, refuse to consent to it, and may decide on leaving some of its own subjects in the hands of the enemy until the end of the war, rather than regain them by recruiting the enemy's ranks, when that enemy is probably in extreme necessity.

Commissaries for Exchange.

But in general a fair system of exchange is willingly promoted by both sides, and for this purpose agents (or "Commissaries") of the respective belligerent powers are allowed to reside within the territories of the opponent, and privileged ships called "Cartel" ships are allowed to ply, if requisite, between the two countries.

Cartel ships.

Mutual release of Prisoners at end of War.

When there have been hostilities between Christian States, the prisoners taken on both sides are now invariably released at the end of the war. A stipulation to this effect is generally inserted in the Treaty of Peace by which the war is formally terminated.

451. We have yet, while considering the subject of transactions by compact between belligerent troops, to consider Truces, Armistices, and some other matters usually included under the phrase "*Commercia belli.*" I shall here follow Halleck, sometimes adopting his paragraphs, and sometimes abridging them. It is necessary to consider the proper purposes of such "Commercia," the persons who have authority to engage in them, and the usual instruments by which they are effected.

Other "*Commercia belli.*"

Necessity of interlocutory compacts during warfare.

452. "Belligerent States and their armies and fleets frequently have occasion, during the continuance of a war, to enter into agreements of various kinds—sometimes for a general or partial suspension of hostilities,

for the capitulation of a place or the surrender of an army, for the exchange of prisoners or the ransom of captured property, and sometimes for the purpose of regulating the general manner of conducting hostilities or the mode of carrying on the war. All these agreements, of whatsoever kind, are included under the general name of *compacts* or *conventions*. These compacts, which relate to the pacific intercourse of the belligerents, suppose the war to continue.

"If the cessation of hostilities is only for a very short period, or at a particular place, or for a temporary purpose, such as for a parley, or a conference, or for removing the wounded and burying the dead after a battle, it is called *a suspension of arms*. This kind of compact may be formed between the immediate commanders of the opposing forces, and is obligatory upon all persons under their respective commands. Even commanding officers of detachments may enter into this kind of compact; but such an agreement can only bind the detachment itself; it cannot affect the operations of the main army, or of other troops not under the authority of the officer making it. A suspension of arms is only for a temporary purpose and for a limited period. If the suspension of hostilities is for a more considerable length of time, or for a more general purpose, it is called a *truce* or an *armistice*. Truces are either partial or general. A partial truce is limited to particular places or to particular forces, as a suspension of hostilities between a town or fortress and the forces by which it is invested, or between two hostile armies or fleets. But a gene-

Suspensions of arms.

Truces and Armistices

ral truce applies to the general operations of the war; and whether it be for a longer or shorter period of time, it extends to all the forces of the belligerent States, and restrains the state of war from producing its proper effects, leaving the contending parties and the questions between them in the same situation in which it found them.

Who may authorize a general suspension of hostilities.

453. "Such a general suspension of hostilities throughout the nation can only be made by the sovereignty of the State, either directly or by authority specially delegated. Such authority, not being essential to enable a general or commander to fulfil his official duties, is never implied; and in such a case the enemy is bound to see that the agent is specially authorized to bind his principal. But a partial truce may be concluded between the military and naval commanders of the respective forces without any special authority for that purpose, where, from the nature and extent of their commands, such authority is necessarily implied as essential to the fulfilment of their official duties. If the commander, in making such a compact, has abused his trust to the advantage of the enemy, he is accountable to his own State for such abuse.

What may be done during such suspension.

454. "During the continuance of a general truce each party to it may, within his own territories, do whatever he would have a right to do in time of peace, —such as repairing or building fortifications, constructing and fitting out vessels, levying and disciplining troops, casting cannon and manufacturing arms, and collecting provisions and munitions of war. He may

also move his armies from one part of his territory to another not occupied by the enemy, and call home or send abroad upon the ocean his vessels of war; and in the theatre of hostilities, and in the face of the enemy he may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement. In the case of a truce between the governor of a fortress or fortified town and the general or admiral investing it, either party is at liberty to do what he could safely have done if hostilities had continued. For example, the besieged may repair his material of war, replenish his magazines, and strengthen his works, if such works were beyond the reach of the enemy at the beginning of the truce, and if the provisions and succours are introduced into the town in a way or through passages which the besieging army could not have prevented. But the besieged cannot construct or repair works of defence if he could not safely have done this in case the hostilities had continued; nor introduce provisions, military munitions or troops through passages which were occupied or commanded by the enemy at the time of the cessation of hostilities; nor can the besiegers continue works of attack which might have been prevented or interrupted by the besieged; for all acts of this kind would be making a mischievous and fraudulent use of the agreement, and violating its good faith and spirit. The general meaning of such compacts is, that all things within the limits of the theatre of immediate operations shall remain as they were at the moment of the conclusion of the truce.

"To receive and harbour deserters within such limits is an act of hostility, and therefore a violation of the complied conditions of a truce.

"Where a truce is granted for a certain specified object, its effects are limited to the purpose mentioned; and if either party should attempt to perform any act to the disadvantage of the other, not comprehended in the object of such truce, this other party has the undoubted right to hinder it by force, notwithstanding the compact. So, where the truce is conditional, and the conditions which have been agreed upon are broken by one party, the truce is no longer binding upon the other.

Of Passports and Safe-conducts.

455. "Passports or safe-conducts are documents granting to persons or property an exemption from operations of war, for the time and to the extent prescribed in the instrument itself. A passport is not transferable by the person named in the permission; for, although there were no objections in giving the privilege to him, there might be very serious objections to the individual taking his place. Instruments of this kind are always to be taken strictly, and must be confined to the persons, effects, purpose, place, and time for which they are granted. Passports and safe-conducts are of two kinds—those which are limited in their effects to particular places or districts of country, and those which are general and extend over a whole country. Those of the first class may be granted by military and naval officers or governors of towns, to have effect within the limits of their respective commands; and such instruments must be respected by

all persons under their authority. The power to issue such documents is implied in the nature of their trust; but a general passport or safe-conduct to extend over the whole country must proceed from the supreme authority of the State, either directly or by an agent duly empowered to issue it" *.

By whom they may be granted.

* Halleck, pp. 653, 654, 655, 657, 658, 663, 664; and see Lieber's Instructions, paragraphs 135 to 143. Lieber remarks in par. 147, that "Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice. In the latter case the war is carried on without any abatement." With respect to the privileges due to the bearer of a Flag of Truce during active operations, Lieber's Instructions are, "The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce if admitted during an engagement. Firing is not required to cease on the appearance of a flag of truce in battle. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever. If it be discovered and fairly proved that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy. So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy."

The rules on this subject, recommended by the Military Committee at the Brussels Conference, are as follows:—

"Art. 43. An individual authorized by one of the belligerents to confer with the other, on presenting himself with a white flag, accompanied by a trumpeter (bugler or drummer), or also by a flag-bearer, shall be recognized as the bearer of a flag of truce. He, as well as the trumpeter (bugler or drum-

Application of these Rules to Belligerents of same State.

456. All these mitigating rules of warfare apply not only to cases where the contest is between two Sovereign States, but to those cases where civil war has broken out between two portions of the same Sovereign State, and to those cases also where the war has broken out between the regular Government of a country and "portions or provinces of the same who seek to throw off their allegiance to it and set up a Government of their own" *.

mer), and the flag-bearer who accompany him, shall have the right of inviolability.

"Art. 44. The commander to whom a bearer of a flag of truce is dispatched, is not obliged to receive him under all circumstances and conditions.

"It is lawful for him to take all measures necessary for preventing the bearer of the flag of truce taking advantage of his stay within the radius of the enemy's position, to the prejudice of the latter; and if the bearer of the flag of truce is found guilty of such a breach of confidence, he has a right to detain him temporarily.

"He may equally declare beforehand that he will not receive bearers of flags of truce during a certain period. Envoys presenting themselves after such a notification from the side to which it has been given, forfeit their right to inviolability.

"Art. 45. The bearer of a flag of truce forfeits his right of inviolability, if it be proved in a positive and irrefutable manner that he has taken advantage of his privileged position to incite to, or commit an act of treachery."

* Lieber, in his 'Instructions,' thus defines "Insurrection," "Civil War," and "Rebellion":—

"Insurrection is the rising of people in arms against their Government, or a portion of it, or against one or more of its laws, or against an officer or officers of the Government. It may be confined to mere armed resistance, or it may have greater ends in view. Civil war is war between two or more portions of a country or State, each contending for the mastery of the whole, and each claiming to be the legitimate Government. The term is also sometimes applied to war of rebel-

457. But there is a description of warfare into which none of the humanities and courtesies which brave soldiers love to practise towards "foemen worthy of their steel," and none of the "*Commercia belli*" which have been dictated by a sense of common utility, can possibly enter. I mean the warfare which has ensued when large masses of soldiery (usually mercenaries) have mutinied against their masters, and could only be crushed into subjection by wide-spread and long-continued hostilities. Such, too, have been many wars consequent on servile insurrections. These outbreaks have almost invariably been accompanied from their very commencement by murders and other atrocities on the part of the mutineers and insurgents, which placed them out of the pale of all laws of mercy, and of all customary forbearances. The most marked instance of this hideous warfare is, in ancient history, the war of the revolted mercenaries against the Carthaginians, B.C. 241, called by the Greek historian of it the Ἀσπονδος Πόλεμος, because it was a war in which there was no truce, no capitulation on terms, no promise or hope of reconciliation, no thought on either side of sparing or of being spared. It is only paralleled in modern times by the dreadful war that has

Of Servile Insurrections and Military Mutinies.

The ancient war between the Carthaginians and their revolted mercenaries.

Our recent war against the Sepoy mutineers.

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lion, when the rebellious provinces or portions of the State are contiguous to those containing the seat of government. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own."—Paragraphs 149–151.

raged in our own day and in our own empire—the War of the Sepoy Rebellion.

Stern necessities consequent on such wars.

458. These, however, are scenes of abnormal horrors. We have witnessed and we have felt that a civilized State may be of necessity involved in them; and the terrible duties which then devolve on its statesmen and its soldiers must be unflinchingly performed. Some ignorant or malignant foreigners, and some false sons of England (surpassing foreigners in anti-English malignity) have railed at our nation for not observing the rules of International Law in a struggle wholly beyond the domain of International Law. I will not waste space here by further allusion to such calumnies, but revert to our proper topic, to warfare within the recognized rules of Belligerency.

Who, in regular warfare, are to be treated as "Combatents?"

459. We have seen what are the limitations and mitigation of armed violence between the respective combatants. The question remains, who are to be considered combatants according to the laws of war? It is a question of equal difficulty and importance, and one which has been of late and still continues to be the theme of much consideration. We have all heard and read many discussions as to how members of bands of partisans, of Guerillas, of Franc-Tireurs, of National Guards, of Volunteers, &c. ought to be treated by the enemy if they fall into his hands; and also much respecting the rights and liabilities of armed citizens and peasants, who take part in the general rising of the population of a country or a district, in what is commonly called a *Levée en masse*. The subject is closely connected with that of the

liability of the unresisting inhabitants of an invaded country to be pressed by the invaders into acting for them as guides, and into other services, as, for instance, in the task of burying the dead, and that of transporting stores and repairing roads. Indeed the subject of how invading armies ought to treat private persons cannot be considered without anticipating to some extent the question of how invaders ought to treat private property, a subject to which we shall soon have in regular order to devote our attention.

It will be convenient to defer for a time the consideration of the employment of Privateers, and of some other matters connected with maritime warfare.

Easy to deal with extreme cases of lawful or unlawful Belligerency: to distinguish between the tranquil citizen and the "armed prowler."

460. In inquiring how far the privileges allowed to lawful belligerents ought to be extended, we shall at once perceive that there are some elementary principles and some extreme cases, which demand no lengthened notice. The primary rule, as given by Montesquieu, respecting the mode of conducting warfare has been already stated and commented on in the tenth chapter of this Treatise*. As it is manifestly unjustifiable, on the one hand, to massacre or to maltreat non-militant unresisting citizens and peasants, it is, on the other hand, as clearly justifiable for an invading army to deal summary execution on "armed prowlers" and marauders, who hang about its flanks and rear for the purpose of surprising and killing its sick and wounded, or its straggling soldiers and small parties, or for the purpose of robbing its stores, but

* P. 364, *suprà*.

who try to hide their weapons and who pretend to be harmless travellers or inhabitants, when they meet with a superior or equal force. The difficulties, which arise in practice, are as to the right of bodies of Volunteers, of Free Corps, of Franc-Tireurs, of bands of partisan and guerilla combatants, and of members of a *levée en masse* to be treated as fair and lawful enemies, entitled in the event of capture or defeat to the forbearances and humanities of modern warfare.

Difficult cases, those of Franc-Tireurs, Guerillas, and members of a *Levée en Masse*.

461. Various tests have been suggested as to what shall and what shall not entitle volunteer corps &c. to be recognized as lawful belligerents. The essence of these tests appears to be, that such corps must be acting under the authority of the Sovereign Government of their State, and that they must wear permanently some uniform, or, at least, some distinctive badge, by which their military character may be recognized at a reasonable distance*. But where national resistance to an invader is general and energetic, there will be always numerous bodies of armed men taking part in the defence of their homes and their country, who have had neither leisure nor means to provide themselves with such accoutrements as an enemy will choose to consider sufficient in martial appearance, or to get an officer with formal commission from their central Government to place himself at their head. This will especially be the case when the population is scattered and the defenders consist

Suggested tests of uniform, and of acting under orders of the Sovereign Government.

* Field's International Code, p. 487, and authorities there cited; Lieber, sect. 81, 82; Recommendations of Brussels Committee, p. 164, Blue Book.

mainly of peasantry accustomed to the use of firearms. As might be expected, the practical result has been that invaded States call on their subjects, whether military or non-military, to rise and defend their country; while invading armies threaten such irregular defenders with severities, which are often sternly enforced, and which are followed up by sanguinary reprisals on the part of the defenders; so that the war assumes an almost internecine character*.

* Mr. Sutherland Edwards has well summed up the usual feeling about the levy *en masse*. "Generally it is a means for the invaded alone, and, as such, is universally condemned by invaders. It may be said that the Prussians condemned it everywhere; but on its own territory, the Prussian, like every other Government, approves and commands it. Not to speak of 1813, a general rising and arming of the local population was ordered in July 1870, when the French were expected to land on the Prussian coast. Would General Vogel von Falkenstein, who decreed the levy, have permitted, without making reprisals, that all members of the coast population falling into the hands of the French should be shot as brigands? Or are laws against civilians taking up arms, laws not of principle but of expediency, to be applied abroad, to be ignored at home? A remarkable conversation on this very subject between Prince Bismarck and M. Jules Favre is reported by the latter in his 'Gouvernement de la Défense Nationale,' from which it appears that, according to M. Favre, the civilian has an absolute right to take up arms against invaders; while, according to Prince Bismarck, 'armed men subject to no regular discipline,' cannot be recognized as soldiers, but are simply 'assassins.' When M. Favre reminded Prince Bismarck that the Prussians had, as a nation, taken up arms against the French in 1813, the Prince replied, 'Yes, but our trees preserve the traces of the inhabitants whom your generals hung upon them.' The French, in fact, mistook the Prussian patriots of 1813 for 'assassins;' and the Prussians in 1870 made the same error, if error it was, in regard to the French. Similarly Na-

Proposed exception in favour of *Levée en masse* of an unoccupied district.

462. Attempts have been made to prevent these evils by introducing an exception to the general rules of warfare as to the need of wearing distinctive uni-

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poleon's generals in Spain executed members of guerilla bands as 'assassins,' which did not prevent Napoleon from ordering a levy *en masse* in France when the country was invaded by the Allies in 1814, nor Prince Schwarzenberg from treating as 'assassins,' or would-be 'assassins,' all who took part in it."

When the Duke of Wellington invaded the South of France in 1814, the army under his command suffered some loss and considerable annoyance from attacks made by the French armed peasantry, who had been to a great extent provoked to taking up arms by the excesses of some of the Spanish troops that were acting with the British. The Duke, while he checked promptly and sternly the pillaging and slaughtering propensities of his Spanish Allies, repressed the partisan warfare of the French population by threats of unsparing military severity. In a proclamation dated 1st of April, 1814, to the French local authorities, he warned them that "Le Commandant en chef fait savoir aux habitans du pays que les lois de la guerre ne permettent pas que l'habitant demeurant dans son village fasse en même temps le métier de soldat. Il faut que ceux qui désirent être soldats aillent servir dans les rangs ennemis; et que ceux qui désirent vivre tranquillement chez eux sous la protection du Commandant en chef, ne portent pas les armes.

"Toute personne non militaire qui sera trouvée en armes sur les derrières de l'armée sera jugée selon les loix militaires et traitée de la manière que les Généraux ennemis ont traité les Espagnols et les Portugais." (Wellington's Despatches, Gurwood's 2nd series, vol. xi. p. 618.)

There is in the same volume of the Duke's Despatches a still more emphatic proclamation, addressed to the inhabitants of two French villages, who had shown especial activity in harassing the Allies.

"*Proclamation aux habitans de Bidarry et Baygorri.*

"28 Janv. 1814.

"S'ils veulent faire la guerre qu'ils aillent se mettre dans les rangs des armées; mais je ne permettrai pas qu'ils fassent

forms or badges, and as to acting under the orders of officers commissioned by the national government. At the Brussels Conference the Swiss Delegate had pointed out that "a country might rise *en masse*, as Switzerland had formerly done, to defend itself without organization and under no command. The patriotic feeling which led to such a rising could not be kept down; and although these patriots, if defeated, might not be treated as peaceful citizens, it could not be admitted in advance that they were not belligerents." This led to a modification by the Russian and other delegates of the chapter originally prepared as to "Who are to be recognized as Belligerents?" The modified Text stood as follows:—

Proposals at the Brussels Conference.

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impunément tour à tour le rôle d'habitant paisible et celui de soldat."

In a letter written by the Duke to Marshal Beresford, which encloses the draft of this Proclamation, he desires the Marshal to print it and circulate it in the villages. The Duke further bids the Marshal to inform the inhabitants that "if I have further reason to complain of these or any other villages, I will act towards them as the French did towards the towns and villages in Spain and Portugal; that is, I will totally destroy them, and hang up all the people belonging to them that I shall find."

The Duke also alludes to this Proclamation, and shows that he was prepared to enforce it, if necessary, in a letter to Earl Bathurst, of 30th of January:—

"I am sorry to have to report that the peasantry of Bidarry have done us a good deal of mischief by their attacks upon our foraging parties; but I have adopted measures which will either put an end to this warfare, or will be a fair warning to those engaged in it of the consequences which will result from it, and a justification to me for making the inhabitants feel it." (Gurwood, vol. xi. p. 489.)

"Art. 9. The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions:—

"1. That they have at their head a person responsible for his subordinates;

"2. That they wear some settled distinctive badge recognizable at a distance;

"3. That they carry arms openly; and

"4. That, in their operations, they conform to the laws and customs of war.

"In those countries where the militia form the whole or part of the army, they shall be included under the denomination of 'army.'

"Art. 10. The population of a non-occupied territory, who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organize themselves in conformity with Article 9, shall be considered as belligerents, if they respect the laws and customs of war"*.

Lieber's Regulations.

Lieber, in his "Instructions"†, states the rule to be that "if the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country at the approach of the enemy, rise under a duly authorized levy *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war. No belligerent

* Blue Book, "Correspondence respecting the Brussels Conference on the Rules of Military Warfare" (No. 1, 1875), p. 164.

† Paragraphs 51 and 52.

has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or a bandit. If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection"*.

Besides thus making "due authorization" a universal requisite for the international legality of a popular rising, he afterwards repeats his rule that inhabitants within a portion of their country, which the invaders have occupied, "who rise in arms against the occupying or conquering army, or against the authorities established by the same," are "War-Rebels"†; and by the rule laid down such "War-Rebels," if captured, "may suffer death, whether they rise singly in small or large bands, and whether called upon to do so by their own but expelled Government, or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence."

Allowance of Belligerent rights to such *levées* is of little value if limited to inhabitants of unoccupied districts.

463. The stipulation that the allowance of Belligerent rights to a *levée en masse* without uniform and without regular official leaders shall only apply to the population of a "non-occupied" territory, deprives the allowance of all practical value. The civilians of a district rarely take up arms in any large numbers, until they have been galled by an enemy's presence among them; and the definition of what is an "occupied district" is very hard to realize. Even if such

* Paragraphs 51 and 52. † Paragraph 85.

a definition can be set out in theory, it is little likely to exercise much practical restraint on victorious invaders. There was on this cardinal point a difference of opinion among the members of the Brussels Conference, on which Lord Derby, the English Secretary of State for Foreign Affairs, naturally animadverted*. As he said, "The German view was, that occupation is not altogether of the same character as a blockade, which is effective only when it is practically carried out. It does not always manifest itself by visible signs. If occupation is said to exist only where the military power is visible, insurrections are provoked, and the inhabitants suffer in consequence. A town left without troops must still be considered occupied, and any rising would be severely punished. Generally speaking, the occupying Power is established as soon as the population is disarmed, or even when the country is traversed by flying columns." Baron Jomini [the First Delegate for Russia] said that the discussion turned upon the word "territory." This was a general expression which must be interpreted liberally ("*interpréter largement*"); a province could not be occupied at every point: that was impossible.

Discrepancies of opinion on this point at the Brussels Conference.

The other view was, "That greater power must not be accorded to the invader than he actually possesses. Occupation is strictly analogous to blockade, and can only be exercised where it is effective. The occupier must always be in sufficient strength to repress an

* See Parliamentary Paper (Miscellaneous), No. 2, 1875, "Further Correspondence respecting the Brussels Conference," p. 4.

outbreak. He proves his occupation by this act. An army establishes its occupation when its positions and lines of communication are secured by other corps. If a territory frees itself from the exercise of this authority it ceases to be occupied. Occupation cannot be presumptive.

"The discussion terminated in the adoption of modified Articles, in which an effort was made to reconcile the conflicting views by the use of carefully balanced expressions. Her Majesty's Government fear that the inhabitants of the invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy."

464. The Blue Book which records the proceedings of the Conference shows that the Delegates for the Netherlands, for Belgium, and Switzerland at Brussels remonstrated warmly against the limitation of the right of National Defence which would be created if the proposal of the representatives of the great Military Powers were adopted, and if it were to be declared a breach of International Law for the inhabitants of an occupied district to rise in arms against the invaders*. Lord Derby, in his concluding Despatch on the subject, refers to these remonstrances; and there can be few Englishmen who can look on them as trifling or fanciful.

"In Baron Lansberge's [the Netherland's Delegate] opinion no country could possibly admit that

* Blue Book, Miscellaneous, 1, 1875.

if a population of a *de facto* occupied district should rise in arms against the established authority of the invader, they should be subject to the laws of war in force in the occupying army. He admitted, that in time of war, the occupier might occasionally be forced to treat with severity a population who might rise, and that, from its weakness, the population might be forced to submit; but he repudiated the idea of any Government contemplating the delivering over in advance to the justice of the enemy those men who, from patriotic motives, and at their own risk, might expose themselves to all the dangers consequent upon a rising.

"Baron Lambermont [the Belgian Delegate] added, that if citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they are about to be shot, the Article of a Treaty signed by their own Government, which had in advance condemned them to death.

"Colonel Hammer [the Swiss Delegate] openly declared that two questions diametrically opposed to each other were before the Committee:—the maxims and interests, on the one hand, of great armies in an enemy's country, which imperatively demand security for their communications, and for their *rayon* of occupation; and, on the other hand, the principles of war and the interests of the invaded, which cannot admit that a population should be handed over as criminals to justice for having taken up arms against the enemy. A reconciliation of these conflicting interests was, in

his opinion, impossible in the case of a *levée en masse* in an occupied country"*.

Risk of enabling invaders to make the invaded act as each other's judges and executioners for attempts to liberate the country.

465. I may add, that if the Russo-German views on this subject were adopted, and were made portions of the Law which all nations are bound to recognize, a practice would be sure to grow up of the invaders compelling the tribunals of the occupied districts to try and to punish captured insurgents for what would under such circumstances be treated as a breach of Municipal as well as International Law. It would not be out of mere malignity that this would be done. It would be a matter of policy for the conquerors to foment mutual illwill and jealousy among the various members of the conquered population; and no measure could be more effective for this purpose than to make them act as each other's executioners and victims.

Bluntschli's proposal to grant Belligerent Rights to all *bonâ fide* members of a *levée en masse*.

466. Some few Jurists have recommended an ampler measure of generous fairness to be shown towards those who rise up in improvized and therefore irregular warfare, summoned by the impulse from within, which bids a man quit himself as a man when he feels the best of omens, the consciousness that he is doing his duty to his country.

Εἷς οἰωνὸς ἄριστος ἀμύνεσθαι περὶ Πατρῆς.

Bluntschli† would extend the character of lawful Belligerents to bodies of men who take up arms with-

* Blue Book, "Correspondence respecting the Brussels Conference," 1, 1875.

† Page 320, sect. 570, and note.

out State authority, on condition that they adopt military organization [that is, so far as possible, and that they observe the laws of warfare], and if it is clear that they are fighting for a Principle, for a public cause, and not, like brigands, from greed, for plunder, or from vindictive cruelty*.

This liberality unlikely to be practised. Conduct of the Prussians in the late war.

467. There is little probability of the great military Powers of the Continent ever adopting such a principle respecting the treatment of irregular belligerents, as has been last mentioned. When the Prussians invaded France in 1870–71 they issued and they enforced a Proclamation, that all Frenchmen taken in arms must, in order to claim the treatment of prisoners of war, carry papers showing that they formed part of the French army; and that persons in plain clothes fighting without authorization from their Government, would, if captured, be brought before a Court-Martial and sentenced to ten years' imprisonment in a German fortress, or, in aggravated cases, executed.

* It is not without confessed hesitation that Bluntschli gives this opinion. His words (as rendered by M. Lardy) are, "On peut hésiter à assimiler aux armées régulières les corps francs non autorisés. L'opinion la plus sévère les déclare hors les lois de la guerre. L'opinion contraire a prévalu ces derniers temps, et on admet que les corps francs doivent être traités en ennemis réguliers, lorsqu'ils sont organisés militairement et combattent pour des *buts politiques*, et non pas, comme des brigands, par cupidité ou esprit de vengeance.

"Les lois de la guerre sont déjà assez sévères contre les ennemis réguliers. Aussi, lorsque les ideés et les intérêts politiques sont assez puissants pour provoquer la formation de troupes organisées et les pousser en masse au combat, il paraît plus juste de leur appliquer les lois de la guerre politique et non les lois pénales."

The English writer who accompanied the Prussians, and who has recorded this Proclamation, states also his belief "that every case in which a Franc-Tireur actually shot a German soldier, was looked on as 'an aggravated case,' and entailed the punishment of death"*.

Arnold on irregular warfare as cited by the Russian Delegate at Brussels.

468. During the discussion at Brussels respecting irregular warfare, the first Russian Delegate, Baron Jomini, quoted a passage from our English historian, Dr. Arnold, declaring "that it is the strict duty of every Government not only to discourage a war of so irregular a nature on the part of a population, but carefully to repress it and to meet the enemy only with regular troops, or with men regularly organized, and acting under authorized officers who will observe the rules which humanity prescribes in a regular war; and what are called patriotic insurrections, or irregular risings of the whole population for the purpose of harassing an invading army, should always be condemned without any distinction being made by whom or against whom this means is employed, as being a resource of restricted and doubtful efficacy, but of certain atrocity, and as the most terrible of the aggravations of the evils of war."

Baron Jomini remarked that this quotation com-

* Sutherland Edwards, p. 123. "In their proclamation affixed at Beauvais in October 1870, the Prussians stated, 'Every attack made by surprise will be followed by the burning of the place. . . . . If arms are not deposited at the *Mairie*, houses where arms are found will be burnt, and the proprietors held responsible.'" Cited in Mr. Manning's Preface to his last edition, p. xl.

pletely expresses his views, and that he entirely agrees with it on every point*.

The passage so much commended by the military Delegate for Russia will be found in the fourth of Arnold's 'Lectures on Modern History;' and there is more in the same lecture written in the same spirit. Arnold, in fact, pronounces a sweeping condemnation against all irregular combatants, as sure to be both "cowardly and cruel;" and he also asserts the general inefficiency of irregular warfare to conquer or to expel an enemy. Arnold's excellent qualities of head and heart entitle all his words to attention; but I believe that in his military criticisms he was greatly influenced by the authority of his personal friend, General Napier, the historian of the Peninsular War. Napier's idolatry for Napoleon and for the Napoleonic school of warfare are notorious; and throughout Napier's volumes the patriotism and the services of the Spanish irregular forces and armed civilians are studiously depreciated. The Duke of Wellington thought differently on this subject, as is abundantly evident from his Despatches; and some of the Duke's correspondence, after the Allied armies had entered France, prove even more strongly that he regarded a general armed opposition by the inhabitants of an invaded country as a most serious obstacle to the progress of a hostile army†.

Remarks on Arnold.

Arnold influenced by Napier, who was prejudiced against Guerilla Warfare.

Wellington regarded armed opposition by the inhabitants of an invaded country as very formidable.

* Blue Book, p. 229.

† See especially his letter to the Spanish General Freyre, dated 5th of March, 1814. After complaining of the acts of pillage on the French inhabitants committed by the Spanish soldiery, the Duke says, "However France may be reduced, there is no doubt

469. With respect to the sweeping assertion that "cowardice and cruelty" are certain characteristics of armed resistance by a country's population against invaders, it is enough to say that Arnold's recollections of the history of Switzerland must have faded for a time from his memory, when he made that charge.

Insurgent Irregulars not necessarily cowardly or cruel.

470. On the whole, whatever may be the mischief connected with the present uncertainty of the Laws of War as to irregular combatants, it would be a mere attempt to cure evil by certainly worse evil, if civilized States in general were to accede to the international legislation in this respect which is proposed by the great military Potentates of the Continent. The members of free States in general, especially of those which do not burden themselves and do not menace their neighbours by permanently maintaining armies of half a million and upwards, have cause to join in the approval which the great majority of Englishmen have given to the conduct of our Minister, Lord Derby, in declining to take part in the proceedings of the martial Congress summoned by the Emperor of

Present state of Laws of War in this respect better than the proposed changes.

Wise conduct of Lord Derby.

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that the army which I am enabled to lead into the country is not sufficiently strong to make any progress, if the inhabitants should take part in the war against us. What has occurred in the last six years in the Peninsula should be an example to all military men on this point, and should induce them to take especial care to endeavour to conciliate the country which is the seat of war." (Gurwood, vol. xi. p. 551.) See too Napier, vol. vi. p. 517. "There was nothing he [the Duke] so much dreaded as the partisan and insurgent warfare proposed by Soult. The peasants of Baygarry and Bidarray had done him more mischief than the French army."

Russia, to consider the laws of military warfare. The interests of Philanthropy may be specious; but the duties of Patriotism are solid. And our British Statesman did his duty in "firmly repudiating, on behalf of Great Britain and her allies in any future war, any project for altering the principles of International Law upon which this country has hitherto acted, and above all to refuse to be a party to any agreement, the effect of which would be to facilitate aggressive wars, and to paralyze the patriotic resistance of an invaded people"*.

* Parliamentary Paper (Miscellaneous, No. 2, 1870), "Further Correspondence respecting the Brussels Conference," p. 7. As proof of how ineffective the Conference was for any really useful purpose, Lord Derby justly pointed out in the same Despatch that its members had been unable to agree even in any modified opinions on the important and very practical subject of Requisitions and Contributions, and that they had felt themselves obliged to leave altogether unnoticed the topic of Reprisals.

The Russian Minister, Prince Gortchacoff, met this Despatch by a letter of "Observations," which also is published in the Parliamentary Papers (Miscellaneous, No. 3, 1875). Prince Gortchacow, in these "Observations," haughtily denies the valid existence of any Positive International Law—although, as he says, "there is a law of nations more or less tacitly admitted, and of which some parts have acquired the force of law by means of formal Treaties.

"The law of nations was not otherwise formulated. Jurists have, upon their own authority, laid down maxims founded on experience, morality, public interest. These maxims have by degrees passed into habits and customs. Some of them, having been precisely stated, defined, and rendered binding by Treaties, have become positive laws."

The Prince claims credit in behalf of Russia for having endeavoured to give the Laws of War, "by means of an ex-

We should now in strict order consider the subject of compulsory labour exacted by the conquerors from

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change of declarations between the Cabinets, a sanction which would be binding."

There is no small amount of august assurance in Russia thus seeking to make Treaty-Obligation the sole valid foundation of International Law; Russia herself having only a few years before the Brussels Conference repudiated the obligations under which the Treaty of Paris had placed her respecting armaments in the Black Sea. I have alluded to this contemptuous breach of pact in a previous chapter (see p. 43). Since that chapter was written I have seen an attempt to palliate the conduct of Russia, and a suggestion that she really in 1871 paid homage to the cause of good faith by formally recognizing the principle, that no Power can liberate itself from the engagements of a Treaty without the consent of the other contracting parties.

It is true that Russia did make a formal admission of this principle; but it is equally true that she practically set it at nought, notwithstanding the remonstrances of England. The main facts are these. In 1856, after the fall of Sebastopol, peace was made between Russia and the Allies by the general Treaty of Paris of the 30th of March, 1856. That Treaty contained many provisions as to many subjects; but its most important stipulation was an engagement on the part of Russia to limit her naval forces and arsenals on the Black Sea to a defined minimum. This limitation of the Russian forces in this quarter had been one of the main objects of the war; and it was especially in order to effect it that the Crimean expedition had been planned and persevered in by France and England.

So long as the strength of both these two great Western Powers remained unimpaired, Russia made no protest against this Treaty, and preferred no claim to be released from any part of it. But near the end of 1870, when the military force of France had been crushed by her defeats in the war with the Germans, when Paris was besieged, and the submission of France to her invaders was obviously only a question of time, the English Government were informed by the Russian Minister, in the name of the Emperor, that

the non-combatant inhabitants of the occupied territory; but this is so intimately connected with the

His Imperial Majesty cannot hold himself bound by the stipulations of the Treaty of 18th (30th) of March, 1856, as far as they restrict his sovereign rights in the Black Sea." The Russian Note, containing this "Denouncement" of the Treaty of Paris, will be found in the 3rd volume of Hertslett's 'Map of Europe by Treaty,' p. 1892. It should be read through, as should also be the "Further Russian Note" which follows it, by all who wish to be satisfied as to the real character of these transactions.

It will be seen that Prince Gortchakoff complains of the stipulations about Black-Sea armaments pressing hardly upon Russia; but he sets out the chief pretext for Russia's conduct in the following words:—"The Treaty of 18th (30th) of March, 1856, has not escaped the modifications to which most European transactions have been exposed, and *in the face of which it would be difficult to maintain that the written law, founded upon the respect of Treaties as the basis of Public Right, and regulating the relations between States, retains the moral validity which it may have possessed at other times.*" He goes on to complain, first, of some changes of government which had occurred in the Principalities of Moldavia and Wallachia, and secondly, of Foreign men-of-war having been suffered to enter the Straits and the Black Sea. As to the first of the matters thus particularized, it is obvious that the affairs of Principalities had nothing to do with the stipulations as to the Euxine; they were of no real importance in themselves; and the mention of so frivolous an excuse shows the weakness of the Russian case. As to foreign ships of war passing the Dardanelles and Bosphorus, it appeared, from inquiries made by the British Government, the result of which was published in a Parliamentary Paper, that in sixteen years eight ships of war only had so passed, that one of these was Russian, only three French or English, and that no infraction of treaty had taken place as to any of them.

The really important new facts which had occurred between the spring of 1856 and the winter of 1870, and which to the Muscovite mind "modified the moral validity" of the Treaty of Paris, were:—first, the temporary prostration of France after the catastrophes of

rules of war as to the power of the conquerors over property, that it will be most conveniently considered in connexion with them.

Sedan and Metz, and her consequent inability to side with England in upholding the Treaty which had been the result of their joint efforts in the Crimean War; and secondly, the determination which the German and Austro-Hungarian Powers had formed not to cooperate with England in any armed resistance to Russia's project for nullifying the protection to the independence of Turkey, which that Treaty of 1856 had created when it limited the Russian armaments in and near to the Euxine. The English Government had ascertained this; and the English Premier informed the House of Commons in the Debate on the Address in 1871, that "We should not have had a single ally among the Neutral Powers if we had proposed simply to insist on the neutralization of the Black Sea." There can be no doubt that Prince Gortchakoff had learned with equal accuracy what policy Austria and other Powers intended to pursue if England went to war for the sake of the denounced Treaty.

Under these circumstances the British Foreign Secretary sent a reply to the Russian Notes protesting against Russia declaring as a general doctrine that a single party to a Treaty might destroy the Treaty at pleasure, but containing the following invitation:—"If instead of such a declaration the Russian Government had addressed Her Majesty's Government and the other Powers who are parties to the Treaty of 1856, and had proposed for consideration with them whether any thing had occurred which could be held to amount to an infraction of the Treaty, or whether there is any thing in the terms which, from altered circumstances, presses with undue severity upon Russia, or which, in the course of events, had become unnecessary for the due protection of Turkey, Her Majesty's Government would not have refused to examine the question in concert with the cosignatories to the Treaty"*.

The hint was taken. Russia condescended to admit that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagement of a Treaty, nor modify

* Hertslett, vol. iii. p. 1900.

Effects of hostile occupation on property.

471. We shall have to divide this matter into the effect of hostile occupation on—

1st. Public property, whether

a. Immovable, or

b. Movable;

and then into its effects on

2nd. Private property, whether

c. Immovable, or

d. Movable.

The labour of inhabitants comes naturally under this last subdivision; for a labourer's capacity to work is his natural property.

Primary rules of Warfare on these subjects.

First, however, we must see the old primary rules of war on the subject—always remembering that the burden of proof as to any part of them having been changed lies on those who assert such a change to

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the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement"*. This ceremonious admission was made by a Protocol signed on the 17th of January at London; and by a Treaty signed there on the 13th of the following month, the articles of the Treaty of Paris as to the navigation of the Black Sea were abrogated, and Russia gained her purpose of discarding the restraints to which she had submitted in 1856†.

* *Ibid.* p. 1904.

† *Ibid.* p. 1919.

It is obvious that after the lapse of a few years, or even of a few months, pretexts never can be wanting for the assertion that some articles of a Treaty have been neglected, and that some changes in the condition of affairs have supervened. If such frivolous excuses are to justify a State in "denouncing" whatever part of the Treaty it finds inconvenient, and in denying the "moral validity" of the written law, Treaties must cease to be worth the paper on which they are written, so soon as the physical power to enforce them is impaired.

to have taken place—and remembering also that the strict right to enforce an old rule as matter of Positive Law may survive, although its enforcement may have become unusual, and may be now regarded as a harshness not consonant with the International Comity, or even with the International Moral Law, which civilized States generally practise. We may, moreover, usefully devote some attention to considering the nature of the dominion which invading belligerents acquire over occupied territory, and of the amount of allegiance due to them by the inhabitants of that territory.

472. I have already stated that by the old primitive laws of war all the goods and chattels of any and every member of a nation engaged in warfare become liable to seizure by any member of the hostile community, that there was a similar liability to personal capture and enslavement, that the immovable property of the conquered, whether public or private, passed to the conquering State, and that the conquering State acquired property over all booty taken in military operations*.

Recapitulation of ancient War Rules.

Such relaxations of these stern old rules as have been effected are of very modern date. Grotius quotes (and he admits the validity of) maxims of ancient writers as to the almost unlimited right which a belligerent acquires by the law of nations over members of the hostile State, even after resistance is ended†. He afterwards devotes great part of one of

The mitigation of these rules is very recent.

Their validity acknowledged by Grotius.

* See *suprà*, pp. 367–389, and notes.

† "Non esse contra naturam spoliare eum quem honestum est necare, dixit Cicero. Quare mirum non est si jus

Grotius only urges that humanity and religion ought to temper the enforcement of these strict rights.

the most interesting chapters in his work to demonstrating that a good and humane conqueror, especially if he be a sincere Christian, will not avail himself of the full rights given to him by warfare; but the existence of these rights is emphatically recognized. Not to take up space by enumerating a host of similar authorities, I will give a conclusive reference to Martens, which shows how, so lately as only a hundred years ago, this subject was regarded in civilized Europe and in civilized America. Martens says,

Dicta of Martens, showing how these matters were regarded so lately as the last quarter of the last century.

"The conqueror has, strictly speaking, a right to make prisoners of war of all the subjects of the hostile State who may fall into his power, though they have committed no violence against him; and of course he has a right to remove them to another country*. But, now-a-day, the conqueror generally carries his rights, in this respect, no further than to submit such subjects to his dominion, to make them swear fealty to him, to exercise certain rights of sovereignty over

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gentium corrumpi ac rapi permiserit res hostium, quos interficere permiserit. Polybius itaque, historiarum quinto, jure belli comprehendi ait ut munitiones hostium, portus, urbes, viri, naves, fructus, et siqua sunt similia, aut eripiantur aut corrumpantur. Et apud Livium legimus, 'Esse quædam belli jura, quæ ut facere ita pati sit fas: sata exuri, dirui tecta, prædas hominum pecorumque agi.' Ipsas urbes totas dirutas, aut mœnia solo æquata, populationes agrorum, incendia singulis ferme paginis apud historiarum scriptores invenias. Et notandum licere hæc in deditos."—Grotius, De Jure, &c. lib. iii. ch. v.

* Martens, however, adds a note showing that the legality of such removals of populations was not unquestioned, according to the then modern law of nations. "Their sovereign never fails to complain of it."

them, such as raising and quartering troops among them, making them pay taxes, obey his laws, &c., and punishing as rebels those who attempt to betray him or shake off his yoke"*. Martens proceeds to describe "the rights of the conqueror with respect to the property of the enemy" in the following language:—

"The conqueror has a right to seize on all the property of the enemy that comes within his power; it matters not whether it be immovable (*conquête, eroberung*) or movable (*butin, beute, booty*). These seizures may be made (1) in order to obtain what he demands as his due, or an equivalent; (2) to defray the expenses of the war; (3) to force the enemy to an equitable peace; (4) to deter him, or by reducing his strength, hinder him from repeating in future the injuries which have been the cause of the war. *And with this last object in view, a power at war has a right to destroy the property and possessions of the enemy for the express purpose of doing him mischief.*

"However, the modern laws of war do not permit the destruction of anything except (1) such things as the enemy cannot be deprived of by any other means than those of destruction, and which it is at the same time necessary to deprive him of; (2) such things as after being taken cannot be kept, and which might, if not destroyed, strengthen the enemy; (3) such things as cannot be preserved without injury to

* Page 286.

the military operations. To all these we may add (4), whatever is destroyed by way of retaliation.

"The victorious sovereign claims the dominion over the provinces and countries conquered by his arms. He appropriates to himself the national domains and all the property belonging to the dispossessed sovereign; and particularly all the fortresses, ships of war, arms, and all other implements of war. The rest of the movable property taken from the vanquished soldiers is commonly given up as booty to the army, or the corps employed on the expedition. The distribution of the booty between the sovereign and his soldiers depends on the military code of the State to which they belong. It is a point that does not belong to the law of nations.

"With respect to the immovable property of the enemy's subjects, and the movable property of those of them who have not taken up arms in the war, though the conqueror has a right strictly speaking to appropriate the whole of it to himself, yet, according to the modern practice, it is left to the proprietors, and a contribution is exacted in its stead. This contribution once paid, whether in money, produce, or service, the invaders ought to pay for all they afterwards receive from the conquered subjects; except it be for such services as every sovereign has a right to require from his subjects"*.

When Martens published this treatise (which as I have already mentioned was translated for the Ameri-

* Martens, p. 287.

can Government by William Cobbett, and which was generally regarded as the best epitome of the Law between Nations*), some effect had been produced by what Vattel had written on the subject about forty years previously. Vattel followed the opinions expressed by Grotius (already referred to), that a just and humane government or general will not enforce the rights of war in all their rigour; but Vattel explained more fully than Grotius had done, how some of the practices sanctioned by the old rules and usages were actual violations of moral or natural laws. The doctrines of Vattel will be found in his third book, in various parts of the 9th, 10th, 11th, 12th, and 13th chapters. They are all based on the principle which he states in a passage, which I have already quoted from him:—"Cette règle générale—tout le mal que l'on fait à l'ennemi sans nécessité, toute hostilité qui ne tend point à amener la victoire et la fin de la guerre, est une licence que la loi naturelle condamne." I have already commented fully on this principle†, and on the nearly contemporaneous maxim of Montesquieu ‡, which requires nations in time of war to do each other as little harm as possible, consistently with their true interest—that is, with the legitimate purpose for which they are waging hostilities. If these maxims are fairly observed, there is no need of the proposed new rules, which assert that warfare is a relation between State and State only, and that private property and the persons of non-combatants are to be held sacred

Vattel on same subject.

Montesquieu.

The suggested new formulas not required for any fair purpose.

* See *suprà*, pp. 117, 125.

† See *suprà*, p. 367.

‡ See *suprà*, pp. 364, 384.

Their advocates confess them to be subject to exceptions, which are fatal to their seeming importance.

from its operations. Those who advocate the introduction of these formulas do not deny that they must be subject to the exceptional rights of the invader to take and to do whatever military necessity requires, the invader being himself judge of that necessity. We shall see presently how worthless for all fair purposes the new rules would be, so long as these exceptions are allowed, although they might and would be made the means of founding captious objections, and of originating and perpetuating many international disputes.

Practical state of things now contemplated.

473. I now revert to consider the rights of Occupying Belligerents a little more in practical detail than we have done in the previous pages. I am not going to repeat here what has been said about the classes of lawful combatants. The immediate purpose of this portion of our work is to consider the case of a belligerent force which is (temporarily at least) superior to any hostile force that can be brought into action against it, and which, during such superiority, is landed in, or marches into, a portion of the hostile territory.

As to the invader's *animus transeundi*, and *animus regendi*.

474. An invasive force of this kind may merely desire to march through a particular district, with a view to carry on operations elsewhere; or it may intend to establish some permanent control over the various districts, or some district which it enters. This last is generally the case; and even where a transit is the purpose for which the territory is entered, the invaders must require the exercise of some authority over the inhabitants during at least the

period of the march; and they almost always avail themselves of the produce of the district. They also generally claim the right, and they still more commonly use the power (if they possess it), of making the inhabitants of any district on their lines of march suffer severely for any armed risings that may be attempted in the rear or on the flanks of the army. Moreover it often happens that parts of the invading forces are stationed near enough to districts to be able to move on them if need requires, without being permanently present. Circumstances such as have been indicated constitute what is termed Constructive or virtual occupation, as contradistinguished from actual occupation. It is obvious that the limits of Constructive occupation must necessarily be vague; and that the invaders are sure to interpret them with severe liberality in their own favour. From the nature of the claims which victorious occupiers make to the submissive obedience, if not to the legal allegiance, of the conquered inhabitants, the real territorial extent of Rights of Occupation becomes often a very serious matter. The great military powers, who keep on foot huge armies always ready to be poured into the lands against which their Imperial masters may declare war, naturally wish the largest possible interpretation to be given to the word "occupied." On the contrary, such States as only keep up moderate armies in peace-time, and which are therefore obliged to contemplate the probability, or rather the certainty, of having for a time at least to maintain defensive operations if war breaks out, desire the rights of

Constructive occupation.

Disputes as to extent of rights of occupation.

"occupying" invaders, to be construed as rigorously as possible*.

Nature of the occupation which is here presupposed.

475. To avoid complication, I will suppose, in what I am about to write respecting rights of military occupiers, that the case is one in which the fact of occupation is clear. By this I mean, that I presume the invaders to be so far predominant in the district that no considerable national force keeps the field against them in any part of it; and that no considerable number of fortified towns or strong places in it are still held by national garrisons. And, further, we will presuppose that the invaders' forces are so complete in numbers and organization, that any forcible opposition made by the inhabitants to the invaders or to officials of any kind appointed by the invaders would be reasonably certain to bring an armed force of the invaders into speedy action on the scene of such opposition. This state of circumstances, or something analogous to it, will be intended in the rest of this chapter when we speak of "occupation."

General nature of the authority of the occupying belligerent.

476. In such a state of things the authority which represents the Sovereign Power of the prevalent belligerent nation, in taking possession "of the enemy's territory, takes possession not merely of the soil and the movable property upon it, but of the Sovereignty over it, and may exercise the latter during such time as it remains in possession of the territory"†.

* See the discussions at the Brussels Conference, p. 160 of Blue Book of Session 1875, and Lord Derby's comments in his Despatch of Jan. 20, 1875, in Misc. Parl. Paper no. 2, 1875.

† Sir Travers Twiss, p. 122.

Practical customary limitations.

477. This is the general principle. Practical limitations have grown up as to the mode of exercising the full right of dominion thus given by the sword which only lasts so long as the sword upholds it. We shall have to consider these limitations presently, especially with regard to the question of whether they are mere restraints of Moral Law, or whether they are to be regarded as steeled into Positive Laws.

General principle.

478. The strict general principle is that the victorious Sovereign Power becomes absolute master of the subject territory, "*durante vi fortioris.*"

The Commander of the occupying army is the natural wielder of sovereign power *durante vi fortioris.*

479. As the acquisition is effected by an army, the commander of that army is the natural representative of the sovereign conquering power, and is so regarded unless the actual sovereign power of the conquering State delegate to some other official the rule over the new province.

Lieber's description of sovereignty of the armed occupant.

It follows (as correctly stated by Lieber) that "a place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

Nature of the martial law which then comes into operation.

"The presence of a hostile army proclaims its martial law" *.

* Lieber's Instructions, paragraph 1, and see Bluntschli, p. 303, sect. 539. "Lorsqu'une partie du territoire, une place forte, une ville, un district est occupé militairement par l'adversaire, cette partie du territoire est aussitôt soumise

Duke of Wellington's description of "Martial Law."

480. "What is Martial or Military Law?"* A very clear and emphatic though brief answer may be given in the words of the Duke of Wellington:—"I understand military law to be the law of the sword, and in all well-regulated and disciplined armies to be the will of the general"†.

I will add a more detailed answer in the words of Lieber.

Lieber's description of Martial Law.

"Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

"The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

"Martial law is simply military authority exercised in accordance with the laws and usages of war.

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aux lois martiales de l'armée qui en a pris possession. La présence des troupes belligérentes sur le territoire ennemi entraîne cette conséquence en plein droit, et sans déclaration préalable."

* Care must be taken that the martial or military law which exists as between nations, and which also exists in cases of rebellion within a State, is not confounded with the martial or military law which States separately enact for the guidance and discipline of their own armies.

† Gurwood's Supplemental Despatches, vol. ii. p. 262.

Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honour, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

"Martial law extends to property and to persons, whether they are subjects of the enemy or aliens to that government"*.

480A. It is usual for the general of the occupying army to allow the local laws of the occupied district to remain in force, so far as they do not interfere with the efficient exercise of his military authority, or with his rights over the resources of the place. It is also usual for him to allow and to require the inferior local officials to continue the discharge of their duties in preserving order †.

Usual to allow old local laws to continue partially in existence.

* Lieber's Instructions, paragraphs 3, 4, 7.

† The Duke of Wellington, in a debate in Parliament on the subject of martial law, gave the following graphic and emphatic account of how he himself had acted in this respect:—"Martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules, and regulations, and limits according to which his will is to be carried out. Now I have, in another country, carried out martial law; that is to say, I have governed a large proportion of the population of a country by my own will. But then, what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my

Interest of the invaders to do this.

481. It is obviously to the interest of the invaders to follow this course. It relieves them of what would be otherwise a burdensome task of legislation and administration; and it tends to diminish the ill-will of the inhabitants towards their new compulsory rulers. The custom of thus allowing local laws and institutions to remain in force, so far as may not be inconvenient to the conquerors, is sometimes spoken of as

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so declared will." Bluntschli writes on this subject as follows:—

"Le chef des troupes d'occupation peut maintenir, en tout ou en partie, l'administration civile et judiciaire telle qu'elle existait avant la prise de possession. Mais cette administration doit se soumettre aux décisions des autorités militaires (1. Inst. amér., art. 3). La sûreté générale et le bien public, que la police et l'administration civile ou judiciaire ont à sauvegarder, doivent être aussi pendant la guerre. Il est impolitique d'ordonner, comme les Autrichiens avaient fait en Bohême en 1866, lors de l'occupation prussienne, à tous les fonctionnaires et même à la gendarmerie de quitter le territoire que l'ennemi se prépare à occuper. L'ennemi souffre beaucoup moins de cette mesure que les nationaux eux-mêmes, dans l'intérêt desquels l'administration est établie. Le gouvernement se rend gravement coupable envers ses ressortissants, en abandonnant tous les établissements publics à la merci de l'ennemi. Il faut cependant distinguer entre les employés dont les fonctions sont purement administratives, et ceux qui remplissent des fonctions politiques. Les premiers n'ont aucun motif de s'enfuir, et ils en ont beaucoup de rester à leur poste, de continuer à exercer leurs fonctions et de chercher à défendre les intérêts locaux ou nationaux. Les fonctionnaires politiques, par contre, céderont plutôt la place devant un ennemi qu'ils ne sont pas tenus de servir et qui leur confierait difficilement la direction du pays. Cette distinction dépend cependant plutôt de la politique que du droit, et n'est pas absolue par conséquent. Certains employés administratifs, qui se sont particulièrement compromis par leur conduite, pourront avoir

if it were a matter of right in behalf of the inhabitants. But, in reality, in such cases the seeming laws of the old Government become laws imposed by the new rulers. The military chief of the occupying army is, or represents, the supreme sovereign power; and the maxim applies, that "Whatever the real Sovereign permits to be commanded and enforces, if needful," is politically commanded by the Sovereign himself*. But the political and legal authority of an occupying enemy over an occupied territory is not absolute or perfect. It is limited by its very nature. It is entirely based on military power, which is essentially provisonal and exceptional. If the invaders are forced to retire from their new conquests, or if from other motives they think it desirable to withdraw from

It is not a matter of right.

Still the sovereignty of military occupant is not complete.

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des motifs suffisant de quitter la contrée et de renoncer à leurs fonctions à l'arrivée de l'ennemi; inversement, certains fonctionnaires politiques pourront juger utile de rester à leur poste et d'attendre les événements. La règle reste cependant: jusqu'à la prise de possession, les employés doivent obéir aux règlements et aux ordres de leur gouvernement. Après la prise de possession, ils cessent de dépendre des autorités de leur pays et doivent, dans les limites fixées par le droit international, se soumettre aux décisions des autorités militaires établies par l'ennemi.

"Les autorités communales, et en général les autorités locales sont, moins que toutes les autres, modifiées par la guerre. Comme elles ont une mission purement locale, elles sont inséparables du lieu ou'elles fonctionnent et passent avec ce dernier sous l'autorité de l'ennemi."

* See Sir H. Maine's comments on the maxim of the Austinian school of jurisprudence, "Whatever the Sovereign permits he commands," in the two concluding Lectures of the 'Early History of Institutions.' I have somewhat expanded the maxim. It is seriously inaccurate if stated in its old terse form.

them, their authority of every kind ceases, and the old Government and laws revive.

The *Jus Postliminii.*

482. The liability of the Belligerent Occupier's right of property to be divested by reconquest is derived from the old Roman "*Jus Postliminii.*" Without pausing here to discuss the archæology of this branch of jurisprudence, we may generally adopt Kent's description, "The *Jus Postliminii* was a fiction of the Roman Law, by which persons, and in some cases things, taken by an enemy were restored to their original legal *status* immediately on coming back under the power of the nation to which they formerly belonged."

Chancellor Kent's account of it.

"'*Postliminium fingit eum qui captus est in civitate semper fuisse*' (Inst. 1. 12. 5). It is a right recognized by the Law of Nations, and contributes essentially to mitigate the calamities of war. When property taken by the enemy is either recaptured or rescued from him by the fellow-subjects or allies of the original owner, it does not become the property of the recaptor or rescuer, as if it had been a new prize, but is restored to the original owner by right of Postliminy upon certain terms. Movables are not entitled, by the strict rules of the Law of Nations, to the full benefit of Postliminy, unless retaken from the enemy promptly after the capture; for then the original owner neither finds a difficulty in recognizing his effects, nor is supposed to have relinquished them. Real property is more easily identified, and therefore more completely within the right of Postliminy. * * * In respect to real property, the acquisition by the

conqueror is not fully consummated until confirmed by the treaty of peace, or by the entire submission or destruction of the State to which it belonged. If it be recovered by the original sovereign it returns to the former proprietor. * * * In a land-war movable property, after it has been in complete possession of the enemy for twenty-four hours (and which goes by the name of 'booty,' and not 'prize'), becomes absolutely his without any right of Postliminy in favour of the original owner. * * * By the ancient and strict doctrine of the Law of Nations captures at sea fell under the same rule as other movable property taken on land; and goods so taken were not recoverable by the original owner from the rescuer or retaker. But the municipal regulations of most States have softened the rigour of the Law of Nations on this point"*.

* Abdy's Kent, pp. 280, 282, 284; and see Phillimore, vol. iii. p. 502. Martens says (p. 292), that in cases of reconquest "(1) the national domains return to the sovereign along with the sovereignty; and the sovereign ought of course to reestablish the constitution existing previous to the conquest. (2) Such immovable property belonging to the subjects as has been seized on by the enemy, returns by virtue of the right of *Postliminium* to the original proprietors. But, as to movable property taken in a land-war, the right of *Postliminium* ceases when the booty has been twenty-four hours in the hands of the captors. In a maritime war, if the recapture be made by vessels of the State, the recaptured merchandise and vessels return to the original proprietors, after a certain proportionate reduction to repay the expenses of the recapture; if the recapture be made by a privateer, neither vessel nor merchandise returns to the original proprietor, except when the recapture is made within twenty-four hours after the capture."

Story on liability of property in occupied territory to revert to original owner.

483. We may here, as to territory, usefully adapt and adopt the words of a judgment delivered by Mr. Justice Story in an American case. "The right which existed [while the enemy was in military occupation] was the mere right of superior force; the allegiance was temporary, and the possession not that firm possession which gives to the conqueror *plenum dominium et utile*, the complete and perfect ownership of property. It could be only by a renunciation in a treaty of peace, or by possession so long and permanent as should afford conclusive proof that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated in the dominion of the [new] sovereign"*.

Mere occupation does not create a general confiscation of immovables.

484. Since military occupation is regarded by International Law as giving only an inchoate general right of dominion over the occupied territory, it follows that, according to the same law, mere military occupation does not create a general confiscation of immovable property. The authorities go further; and they establish the principle, that if a general edict of confiscation of such property were issued by the sovereign of the occupying forces, it would not effect any permanent transfer of rights, such as neutral States would be bound to recognize, or justified in recognizing, or such as would retain any validity after the withdrawal of the compulsory sanction given to it by the presence of the conquering

* *The United States* v. *Hayward*, 2 Gallisen's Reports, 500, cited in 3 Phillimore, p. 737.

armies on the land in question. It is a necessary adjunct of these propositions that alienations to third or neutral States, of an enemy's occupied territory are invalid, though the party making the alienation has actual physical possession of the territory. It is indeed regarded as a breach of neutrality for a third State to become a party to such a contract *.

Alienations of occupied provinces to third Powers invalid.

485. For so long a time as the military occupation may be continued, the invader enters on all the public rights of the original sovereign; and the national domains and public buildings, whether constructed for pacific or martial purposes, become his property while he continues to be the *de facto* possessor of the district. To destroy or to despoil public libraries or

The conqueror is *de jure* proprietor so long as he is *de facto* possessor.

Museums and public buildings generally should not be injured.

* "Les immeubles, les terres, les provinces passent sous la puissance de l'ennemi qui s'en empare; mais l'acquisition ne se consomme, la propriété ne devient stable et parfaite, que par le traité de paix, ou par l'entière soumission et l'extinction de l'État auquel ces villes et provinces appartenaient.

"Un tiers ne peut donc acquérir avec sûreté une place, ou une province conquise, jusqu'à ce que le Souverain qui l'a perdue y ait renoncé par le traité de paix ou que commis sans rétour il ait perdu sa souveraineté. Car, tant que la guerre continue, tandis que le Souverain conserver l'espérance de recouvrir ses possessions par les armes, un prince neutre viendra-t-il lui en ôter la liberté, en achetant cette place, ou cette province du conquérant? Le premier maître ne peut perdre ses droits par le fait d'un tiers; et si l'acquéreur veut conserver son acquisition, il se trouvera impliqué dans la guerre." (Vattel, liv. iii. ch. xiii. sects. 197, 198; and see Sir Travers Twiss, pp. 126 and 127).

On the other hand, "The vanquished sovereign has no power as against the conqueror to alienate any part of his own territory, which may be at the time in the possession of the latter." (Halleck, p. 798.)

museums, and, generally speaking, to do injury to works of art, which by their intrinsic beauty or by historical associations have an interest for all civilized mankind, are acts now generally regarded as disgraceful to their perpetrators, and as violations of the established practices of lawful warfare.

As to private immovable property.

486. With respect to private immovable property, mere hostile military occupation of the district does not affect the title of each individual owner. As is pointed out by Sir Robert Phillimore*, "It has been well laid down by the tribunals of the North-American United States, that the modern usage of nations, and large and important parts of International Law would be violated, the sense of justice and right, which is felt and acknowledged by the civilized world, would be outraged, if private property were generally confiscated and private rights annulled. The people indeed change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed." I should interpret this rule as not exempting the land of a private owner from seizure and sequestration on account of offences, which its owner may commit against such new laws as may be ordained by the military occupier. Whether an absolute sale of the land in such a case would be valid may be open to doubt and argument. But there is no doubt as to the conqueror's power to impose taxes and contributions on private immovable property; and it seems difficult to dispute the liability

Dicta of American judges cited by Phillimore.

This does not exempt from seizure for breach of the laws made by the new sovereign.

* Vol. iii. p. 731.

of the owner to be deprived by his new masters of such property for breach of allegiance to them committed by breach of their laws.

Nature of the allegiance of the inhabitants to the occupying Belligerent Sovereign.

487. The nature of this allegiance of the inhabitants to the new sovereign, who for the time rules them by right of the sword, whatever be the laws which he thinks fit to employ as formal instruments of his will, is very difficult to explain and define; but the invader's right to enforce a relationship of sovereign and subject is unquestionable. In Lieber's Instructions it is laid down that "commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance, or an oath of fidelity to their own victorious government and rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives"*.

"A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the service due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another. The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change" †.

"The United States acknowledge and protect, in hostile countries occupied by them, religion and morality,

* Lieber's Instructions, paragraph 26.

† Ibid. 27.

and strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished. This rule does not interfere with the right of the victorious invader to tax the people on their property, to levy forced loans, to billet soldiers, or to appropriate property, especially house, land, boats, or ships, and churches for temporary and military uses."

Lieber's definition of the "war-traitor."

"A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law, who, unauthorized by the military commander, gives information of any kind to the enemy or holds intercourse with him.

Punishment of the "war-traitor."

"The war-traitor is always severely punished. If his offence consists in betraying to the enemy any thing concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death. If the citizen or subject of a country or place invaded or conquered gives information to his own government from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offence. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise"*.

Rights of occupying-belligerents over movable property.

488. The laws and usages of War with regard to an enemy's movable property have been already more than once incidentally stated while we have been re-

* Lieber's Instructions, paragraph 90.

ferring to authorities as to the general rights of armed occupiers. According to the old rule, all movable property found in the enemy's territory is booty (*butin*) of war; and the right to it passes to the occupying belligerent power. The former actual owners of the property are not distinguishable, with respect to any right of retention as against the victors, from the body of the enemy-nation. The property passes to the Sovereign Representative of the prevalent belligerent State; and the Roman maxim is still in force, that "Parta bello cedunt reipublicæ." Whether the soldiery, who actually effect the conquest of the property are to retain it; and, if so, how they are to share it, must be determined by the victorious State's own institutions; and they form no portion of International Law*.

Old strict right as against private owners as well as against State-property.

489. Such is the strict right. With respect to modern usage, it is usual for the conquerors to seize and appropriate all movable property belonging to the hostile State, especially if of a nature serviceable for hostilities, such as implements of war, military and naval stores, and moneys. But, by a custom so general and so well established that it may be considered a rule, a victorious enemy, on gaining possession of a town or province, refrains from destroying or carrying away State papers, public archives, historical records, and legal documents. They may properly be kept and used by the belligerent so long as he keeps possession of the place; but when he withdraws, and

Mitigated modern usages.

Archives, records, &c. not permanently appropriated.

* Vattel, livre iii. chap. ix. pp. 287, 288, n. Sir Travers Twiss. 199 sects. 163, 164, 165. Martens,

when the original proprietors' right of dominion revives, these and similar documents, which are essentially evidences of title and instruments of ownership, should be left uninjured for their former masters*.

Claim for works of art being privileged from seizure.

490. A similar immunity from appropriation by a victor is now generally claimed for works of art, such as pictures and statues in national collections. The subject, as a matter of strict right, is not altogether free from doubt; but no one could censure liberality and self-denial on the part of conquerors in such matters; and beyond all question, the wilful destruction or damage of such works would be regarded with universal censure and indignation†.

Modern usage as to private movable property. It is spared except for purposes of military necessity. Large effect of this exception.

491. The modern usage as to private movable property is for the occupying belligerent not to appropriate it, and not to destroy or damage it without compensation, except for purposes of military necessity. This exception runs through all the rules that have been adopted or propounded in favour of the supposed sanctity of private property; and while this exception continues to be recognized (and it ever will be practically recognized so long as wars exist) no useful purpose can be served by the introduction of new-fangled phraseology about private individuals being at peace, though their countries may be at war, and about rights to private property being beyond the sway of the sword. Montesquieu's limitary maxim as to a belligerent State's rights in waging war is quite sufficient, if honestly observed,

The old maxim of Montesquieu is true, and is sufficient.

* Halleck, p. 453.

† See as to this Halleck, p. 454; Sir Travers Twiss, p. 129.

for effectuating all the good which the nature of things will allow to be wrought in mitigating the horrors of hostilities. I have already cited and commented on that maxim *; but the present is a proper place for bringing it again before the reader's notice.

Montesquieu's maxim repeated and explained.

492. Montesquieu's maxim is that "Nations ought to do each other as little harm as possible, without prejudice to their true interests."

The "true interest" of a belligerent State is to obtain either redress for a wrong, or safeguard against a wrong, or both.

A belligerent act of harm is internationally lawful if it directly and substantially tends to effectuate the true and lawful purpose of the war.

Every harm to person or property is internationally unlawful which is done out of mere wantonness, or cruelty, or vindictiveness, or which, although it may conduce to one of the true and lawful purposes of the War, does so only indirectly and unsubstantially†.

Meaning of "military necessity." How much this "*sæva necessitas*" embraces.

493. Bearing these principles in mind, we shall find that, according to the best authorities, although it is no longer usual to enforce in full rigour the ancient and still-subsisting rights of war against property, still, if "military necessity" (which I interpret as equivalent to "the true interest of a belligerent

* See *suprà*, p. 364.

† See *suprà*, p. 365, for the importance of the test of "Directness and Substantiality." See also pp. 367, 368, for authorities that "a state of war puts all the subjects of the one nation in a state of hostility with those of the other."

State") requires it, an invading or occupying force may seize property, may levy taxes and requisitions, may ravage territory, destroy buildings, and generally may do all acts tending directly and substantially to weaken the enemy, and to bring about his submission.

Vattel's doctrine.

494. Vattel says of the State, which justly wages war, that "Il a le droit d'affaiblir l'ennemi, pour le mettre hors d'état de soutenir une injuste violence; le droit de lui ôter les moyens de resister. De là naissent, comme de leur principe, tous les droits de la guerre sur les choses qui appartiennent à l'ennemi. Je parle des cas ordinaires, et de ce qui se rapporte particulièrement aux biens de l'ennemi * * * On est en droit de priver l'ennemi de ses biens, de tout ce qui peut augmenter ses forces et le mettre en état de faire la guerre. Chacun travaille à cette fin de la manière qui lui convient le mieux. * * * Au pillage de la campagne et des lieux sans défense on a substitué un usage en même temps plus humain et plus avantageux au Souverain qui fait la guerre; c'est celui de *contributions*. Quiconque fait une guerre juste est en droit de faire contribuer le pays ennemi à l'entretien de son armée, à tous les frais de la guerre. Il obtient aussi une partie de ce qui lui est dû; et les sujets de l'ennemi se soumettant à cette imposition, leurs biens sont garantis du pillage, le pays est conservé. Mais si un général veut jouir d'une réputation sans tache, il doit modérer les contributions, et les proportionner aux facultés de ceux à qui il les impose. L'excès en cette matière n'échappe point un reproche

de dureté et d'inhumanité. S'il montre moins de férocité que le ravage et la destruction, il annonce plus d'avarice ou de cupidité. * * * S'il est permis d'enlever les biens d'un injuste ennemi pour l'affaiblir, où pour le punir, les mêmes raisons autorisent à detruire ce qu'on ne peut commodément emporter. C'est ainsi que l'on fait le dégât dans un pays, qu'on y détruit les vivres et les fourrages afin que l'ennemi ne puisse subsister: on coule à fond ses vaisseaux, quand on ne peut les prendre ou les emmener. Tout cela va au but de la guerre; mais on ne doit user de ces moyens qu'avec modération, et suivant le besoin" *.

495. I have already quoted the passage on the subject in Martens as "to the conqueror's right to seize on all the property of the enemy that comes within his power," that one purpose for which such seizure may be made is to weaken the enemy, and that "with this last object in view a Power at war has a right to destroy the property and possessions of the enemy for the express purpose of doing mischief"†. Martens.

496. Wheaton's words on the subject are as follow:—"Du moment où un État est en guerre avec Wheaton.

* Vattel, livre iii. chap. ix. sects. 160, 164, 165, 166. I have already cited Vattel's epitomized statement of the rule which restrains a belligerent's general right "de piller et de ravager le pays ennemi." He says, "Tout revient à cette règle générale, 'tout le mal, que l'on fait à l'ennemi sans nécessité, toute hostilité, qui ne tend point à amener la victoire et la fin de la guerre est une licence que la loi naturelle condamne'" (Livre iii. chap. ix. sect. 172).

† Martens, pp. 288, 289. The whole passage will be found *suprà*, p. 499.

un autre, il a, en principes généraux, le droit de saisir toute la propriété de l'ennemi, de quelque espèce et en quelque lieu qu'elle soit"*. He adds that, by the modern usage of nations, "La propriété privée sur terre est exempte de confiscation à l'exception de celle qui peut se convertir en butin en certains cas, quand elle est enlevée à l'ennemi dans les camps ou dans les villes assiégées, et à l'exception des contributions militaires levées sur les habitants d'un territoire ennemi." Afterwards he puts the interrogatory, "Ravage du territoire ennemi, quand est-il loyal?" He appeals for answer to the "même principe, originel du droit naturel qui nous autorise à nous servir contre l'ennemi du degré de violence nécessaire seulement pour assurer l'objet des hostilités. La même règle générale qui détermine jusqu'à quel point il est légal de détruire la personne des ennemis, servira de guide pour juger jusqu'à quel point il est légal de ravager ou de laisser dévaster leur pays. Si ce moyen est nécessaire pour arriver au juste but de la guerre, il peut être employé légalement, mais non pour un autre objet. Aussi si nous ne pouvous arrêter les progrès d'un ennemi, ni secourir nos frontières, ou si l'on ne peut approcher d'une ville qu'on peut attaquer sans dévaster le territoire intermédiaire, le cas extrême peut justifier le recours à des mesures que l'objet ordinaire de la guerre n'autorise pas"†.

Sir Travers Twiss.

497. Sir Travers Twiss follows Vattel in stating that, according to modern usages, the victorious Power,

* Éléments du Droit International, tome 2. p. 5.

† Wheaton, Éléments &c. tome 2. p. 6.

"in case it should assert its right of conquest over the private property of enemy-citizens, limits itself to levying upon them a contribution of money or provisions, in consideration of which their actual property is guaranteed from pillage." He adds the same admonition as that given by Vattel, as to the commander of an occupying army being moderate in his demand of contributions. He proceeds to observe that "the exercise of the natural right of a belligerent to ravage the enemy's territory, with the exception of those cases in which the conduct of the enemy has merited special chastisement, is governed by the maxim that nothing is allowable against an enemy but what is necessary, and nothing is necessary which does not tend to procure victory and bring the war to a conclusion. All damage, therefore, which is done to an enemy without any corresponding advantage accruing to the belligerent is an abuse of the natural right of the latter. Thus, indeed, a belligerent is entitled to capture all the property of an enemy which is calculated to enable him the better to carry on hostilities, and, if he cannot carry it away conveniently, to destroy it. A belligerent, for example, may destroy all existing stores of provisions and forage which he cannot conveniently carry away, and may even destroy the standing crops in order to deprive his enemy of immediate subsistence, and so reduce him to surrender. But a belligerent will not be justified in cutting down the olive trees and rooting up the vines; for that is to inflict destruction upon a country for many years to come, and the belligerent cannot derive any corresponding advantage therefrom."

Mr. Manning.

Mr. Manning states that "movable property is still considered as liable to seizure; but, by the practice of modern warfare, this also is frequently respected, the right of seizing movable property being relinquished for the levy of requisitions or forced contributions, of different things needed by the invading army; and as long as these are supplied, all other movable property is respected by the hostile force, and cannot be taken unless paid for, excepting such cases as where towns are taken by assault, or where retaliation is used for the conduct of the enemy. Requisitions in a hostile country have advantages over a system of irregular booty, both to the invading army and to the possessors of property in the hostile country,—to the invading army because greater regularity in its supplies may be relied on when irregular plunder is not allowed, and to possessors of property because they will only have to supply what the army requires, and not be exposed to the additional evils of the cupidity and licence of marauding soldiery"*.

General Halleck. His classes of exceptions to modern usage of sparing private property.

498. General Halleck discusses the subject very fully and very ably. He enunciates the old rule as still subsisting, which makes all private property liable to be taken by the conqueror. He states also that the modern usage is not to touch private property and land without making compensation, except in certain cases, which he arranges under three heads. The first exception permits the military occupier to seize upon private property by way of punishment for the illegal acts of individuals, or of the community to which they

1st. Contributions inflicted by way of punishment.

* Manning's 'Law of Nations,' p. 182, ed. 1875.

belong. It is a general rule of war that communities are accountable for the acts of their individual members; and if an offence against the occupying authorities has been committed by members of a district or village or town, it is usual to inflict punishment (generally by the levy of a contribution) on the community. Another head of exceptions relates to the seizure of booty by victorious soldiery on the storm of a fortified position or town. This is a matter to be spoken of presently. The most important class of exceptions arises from what General Halleck terms a belligerent's right to make the enemy's country contribute to the expenses of the war. His observations on this subject were based on what he had seen as a soldier, as well as on what he had read as a jurist. They deserve careful attention; and it will be seen that he (agreeing with the French writer Hautefeuille, already quoted*) considers that the usual mitigation of old rules as to the seizure and plunder of property has been mainly caused by regard to the discipline and military efficiency of the invading troops.

2nd. Property taken in a successful assault.

3rd, and most important class of exceptions arising from right of conquerors to make the hostile territory furnish supplies.

Halleck says†, "Troops in the enemy's country may be subsisted either by regular magazines, by forced requisitions, or by authorized pillage. It is not always politic or even possible to provide regular magazines for the entire supplies of an army during the active operations of a campaign. Where this cannot be done, the general is obliged either to resort to military requisitions, or to intrust their subsistence to the troops themselves. The inevitable consequences

* See *suprà*, p. 387. † Halleck, p. 458.

The marauding system. Its bad effects on the troops.

of the latter system are universal pillage and a total relaxation of discipline. The loss of private property and the violation of individual rights are usually followed by the massacre of straggling parties; and the ordinary peaceful and non-combatant inhabitants are converted into bitter and implacable enemies*. The system is therefore regarded as both impolitic and unjust, and is coming into general disuse among the most civilized nations, at least for the support of the main army. In case of small detachments, where great rapidity of motion is requisite, it sometimes becomes necessary for the troops to procure their subsistence wherever they can. In such a case the seizure of private property becomes a necessary consequence of the military operations, and is therefore unavoidable. Other cases of similar character might be mentioned; but even in most of these special and extreme cases, provisions might be made for subsequently compensating the owners for the loss of their property."

Halleck's reference to effect on Napoleon's armies of employing the system of pillage.

499. Halleck then refers to the system frequently pursued by Napoleon, especially in the Spanish war, of supplying his troops by means of forced requisitions and pillage. Halleck points out the pernicious effects which this system caused to the French armies†.

* See the Duke of Wellington's opinions on this in the passages from the Wellington Despatches, cited *suprà*, p. 490.

† Halleck, p. 459. In Count Ségur's Memoirs there is an elaborate account of the system of supporting an enemy by "la maraude," as it was practised in some of the French Revolutionary armies, and carried to a still greater height under Napoleon. A copy of this, with a valuable commentary, will be

United States Government proclaim an occupying belligerent's right to take supplies without payment.

500. General Halleck (who served with the forces of the United States in the Mexican War) quotes the instructions issued by the American Secretary of War (Mr. Marcy) to the United-States commander, General Taylor, that "an invading army has the unquestionable right to draw its supplies from the enemy without paying for them, and to require contributions for its support, and to make the enemy feel the weight of the war. He further observed that, upon the liberal principles of civilized warfare, either of three modes might be pursued in relation to obtaining supplies from the enemy:—first, to purchase them on such terms as the inhabitants of the country might choose to exact; secondly, to pay a fair price, without regard to the enhanced value resulting from the presence of a foreign army; and third, to require them as contributions, without paying or engaging to pay therefor; that the last mode was the ordinary one; and General Taylor was instructed to adopt it, if in that way he

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found in a memorandum (dated 1825) drawn up by the Duke of Wellington, and now published in the third series of the Wellington Despatches, vol. iii. p. 10. The Duke's observations are very striking. He says that "No other army excepting the French army could have subsisted in the manner in which the French did. No other army known in Europe is sufficiently under command." He demonstrates forcibly the terrible amount of suffering and loss which the French troops underwent in consequence of this system; and he proves its physical evil effects on the men "and on the horses of the army in particular."

Other memoirs of officers who served under Napoleon have been lately published. They fully concur with Count Ségur as to the evil which "la maraude" caused to the French.

was satisfied he could get abundant supplies for his forces."

General Halleck adds that "There can be no doubt of the correctness of the rules of war as here announced by the American Secretary; but the resort to forced contributions for the support of our armies in a country like Mexico, under the particular circumstances of the war, would have been at least impolitic, if not unjust; and the American generals very properly declined to adopt, except to a very limited extent, the mode indicated. It would undoubtedly have led to innumerable insurrections and massacres, without any corresponding advantages in obtaining supplies for the American forces"*.

Halleck's opinion as to the marauding system being pernicious to the army which employs it.

The General mentions plans which might be adopted for moderating the evils of indiscriminate pillage; but he adds, "Modify and restrict it as you will, the system of subsisting armies on the private property of an enemy's subjects without compensation is very objectionable, and almost always leads to cruel and disastrous results. There is therefore very sel-

* Halleck, p. 460. Another American State-paper, issued during the Mexican war by President Polk, declared the "right of the conqueror to levy contributions upon the enemy, in their seaports, towns, or provinces, which may be in his military possession by conquest, and to apply the same to defray the expenses of the war. He further declared that the conqueror possessed the right to establish a temporary military government over such seaports, towns, or provinces, and to prescribe the terms of commerce with such places; that he might, in his discretion, exclude all trade, or impose terms upon it—such, for instance, as a prescribed rate of duties on tonnage and imports." See note to Kent's Commentaries, vol. i. p. 102, 9th ed.

dom a sufficient excuse for resorting to it"*. With respect to destruction of property, Halleck says that there is no doubt of waste and useless destruction being forbidden alike by the law of nature and the rules of war. "But if such destruction is necessary in order to cripple the operations of the enemy, or to insure our own success, it is justifiable"†.

His opinion as to when ravages are lawful.

501. Armies of moderate numbers have occupied hostile territory, and have carried on invasive operations without imposing any pecuniary burden whatever on the inhabitants. Such was the case with the forces which the Duke of Wellington commanded in Southern France in 1813 and 1814, after he had repressed the pillaging in which some of his Spanish auxiliaries indulged as soon as they crossed the Pyrenees, and after he had quelled the insurrectionary movements of the French peasantry, which those excesses of the Spaniards had provoked. Such was the case also in 1815 with the British army, which the Duke led from Waterloo to Paris. Every article, that was required for the troops, was scrupulously paid for in specie at full value; and careful arrangements were made with the local authorities for the conduct of the negotiations for purchase and sale in the fairest and most orderly manner, and with as little interruption as possible to the pacific occupations of the inhabitants. The result was eminently favourable to the comfort, the discipline, and to the military efficiency of the invading troops which the Duke commanded in the campaigns in question. As a mere matter of

Instances in which invading armies have paid in coin for all that they required.

This system advantageous for the invaders.

* Page 461. † Page 464.

Cannot be practised with such enormous armies as are now employed.

economy, the most liberal system was found to be the cheapest. But with such enormous armaments as those which France and Prussia raised for their late conflict, and as those which Russia, Germany, France, and Austria now maintain even on their peace establishments, wars of invasion cannot possibly be conducted on the plan of the invaders paying for all that they require*. This is not the least of the evils caused by the excessive increase of their military levies and organizations, in which the great Powers of the Continent are now vying one with the other. The country which is the seat of warfare is certain now to experience the heavy burden of supporting armed foreigners by tens of thousands and by hundreds of thousands. "It is held that invaders are entitled to claim from the invaded lodging, food and drink, fuel, clothing, and carriage. Soldiers are billeted on the inhabitants and have to be fed; the peasants of the neighbourhood are impressed as drivers, and, if necessary, as grave-diggers; requisitions are issued, contributions are levied. Nothing is sadder than the position of a conquered population. Every minute of their life is full of the most bitter humiliations." Such is the case, though acts of individual brutality or oppressiveness by the foreign soldiers may be rare, and though "la maraude" may be effectually prohibited†.

The Brussels Conference unable to settle the difficulties as to private property being sacred, and yet liable to requisitions.

502. The task of trying to reconcile the proposed new maxim of the inviolability of private property with

* See Mr. Sutherland Edwards, pp. 63, 192.

† See Sutherland Edwards, *passim*, especially at pp. 54 and 64.

the right to levy contributions on it, pressed hard on the Delegates at the Brussels Military Conference. There was much discussion on the subject; but the difficulty proved insuperable, and ultimately the Committee separated without being able to agree on any definite rules in this most important matter*. This was the result when practical men had to consider the subject; and even the theorists who recommend the adoption of M. Portalis's specious but fallacious distinction between private members of a community and component members of a State, are obliged to admit that the doctrine of private property being privileged must give way in cases of "military necessity." The vagueness of this exception is lamented by them; but the exception is confessed to exist; and it makes another instance of the numerous family of exceptions which are so indefinite and so potent as to overwhelm and destroy the rules to which they are supposed to be mere incongruous accessories. Among the writers who have lately supported the doctrine in question, none is entitled to more respect than Mr. Dudley Field. He recognizes the proposed rule, "that private property ought to be respected as far as possible;" but he adds, that the rule is "subject, however, to the ill-defined exception of Military Necessity"†.

The theorists of the new school are forced to own that "semper anteit sæva necessitas."

Mr. Dudley Field's admission as to this.

503. I have already endeavoured to explain gene-

Formidable comprehensiveness of the term "Military Necessity."

* See Blue Book, pp. 269 to 280, and elsewhere. And see Lord Derby's comment on this subject, already cited at p. 492 *suprà*.

† Proposed New Code of International Law, p. 526.

rally what is embraced by the term "Military Necessity." Some instances of how much it includes may be found in Lieber's Instructions. It is there said that "Military Necessity admits of all direct destruction of life or limb of armed enemies, *and of other persons, whose destruction is incidentally unavoidable in the armed contests of the war. It allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy, of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the enemy.* War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed *or unarmed*, so that it leads to the speedier subjection of the enemy"*.

Illustrated from Lieber's Instructions.

504. Bluntschli maintains the right of belligerents to destroy property in the course of military operations; and remarks that "toutes ces atteintes à la propriété privée sont la conséquence des nécessités de la guerre"†. He lays down rules that an occupying army has a right to make the inhabitants supply it with "lodging, provisions, clothes, and means of transport"‡. He has the good sense to perceive, and the candour to state that the written receipts for articles so supplied are of little practical value to the inhabitants from whom they are taken. He adds, that "Les Réquisitions sont la plupart du temps pour les particuliers un mal inséparable de la guerre, et qui

Bluntschli's concession of rights of Belligerents to take and destroy according to martial need.

His description of the misery caused by the military requisitions.

* Lieber's Instructions, par. 17.

† P. 365.

‡ P. 366, sect. 653, i.

doit être supporté per ceux qui en sont atteints "*. Sentences like these take all value and vitality out of an announcement that "Le vainqueur doit respecter la propriété privée," and out of any number of repetitions that "Les états seuls sont ennemis dans le vrai sens du mot." Heffter also, who cites with approbation the phrases of Talleyrand about War being "point une relation d'homme à homme, mais une relation d'État à État"†, expressly states that a victorious enemy "pourra exiger des contributions, requérir des prestations en nature ou personnelles, et au besoin, s'il rencontre de la résistance, il emploiera la force, et se mettra en possession des objets requis, sauf l'indemnité à fixer par voie de compensation ou autrement, lors de la conclusion de la paix. Il est impossible de tracer des règles précises sur l'étendue de la faculté dont jouit chacune des puissances belligérantes de saisir les biens des sujets ennemis; car pendant la guerre les nations ne reconnaissent entre elles aucun juge supérieur"‡.

Heffter on the right to levy contributions, &c.

505. The only real, intelligible, and practical rule of restraint on a belligerent who coerces, or who damages, or who destroys either persons or property in hostile territory, is the maxim of Montesquieu, which has so often been cited and expounded in this volume. Sir Robert Phillimore rightly generalizes in the same manner all the dogmas, which seek to limit the employment of destructive forces in warfare, by a reference to this maxim. He adds the following sen-

The only sound and consistent rule is that given by Montesquieu.

Phillimore's generalization.

* P. 367, sect. 653, cj.
† P. 226, note.
‡ Page 252.

sible and sound observations:—"The great principle upon which all these rules are framed is that of, on the one hand, compelling the enemy to do justice as speedily as possible, and, on the other hand, of abstaining from the infliction of all injuries both upon the subjects of the enemy, and upon the government and subjects of third Powers, which do not, certainly and clearly, tend to the accomplishment of this object.

"Wanton devastation of the enemy's territory, wanton cruelty exercised towards his subjects, are therefore, according to the principles and practice of Christian nations, unjustifiable and illegal.

"Nevertheless it is to be remembered that, as the will of the subject is bound up in that of his Government, it may well be that the consequences of the conduct of his rulers may be attended with injury both to the person and property of the subject, and that the enemy is justified in striking through them at the Government from which he has received a wrong, and for which redress has been denied.

"It is, in fact, in many cases, only through the privations and distresses of the subject that his Government will be induced to put an end to the war by according the justice demanded"*.

Of impressment of inhabitants as labourers.

506. As has been stated †, the right or supposed right to exact labour from the population of the occupied district is closely connected with questions relating to private property. It may also be regarded as a branch of the conqueror's quasi-sovereignty over

* Phillimore, vol. iii. p. 68. † See p. 496.

the territory, so long as his sword serves as sceptre: or it may be considered as coming within the very elastic boundary of the prerogatives which belligerents assume for reasons of military necessity. To take an extreme case: no one would censure the commander who, after a battle, compelled the peasantry of the neighbourhood to help in burying the dead. To leave this undone, besides the revolting nature of such neglect, would be to expose both the troops stationed near the battlefield and the peasantry themselves to the outbreaks of pestilence. To take an extreme case the other way, almost every one would concur in blaming the officer who forced the natives of the land to prepare batteries or other works directly intended for destructive operations against their own countrymen. Yet it is not uncommon to cause roads to be repaired or made by forced labour, and to employ by compulsion carters, teams, and vehicles of all kinds for the transport of troops and stores, including ammunition to be used forthwith against the yet unsubdued portions of the national army of the occupied territory. Mr. Sutherland Edwards's narrative of the Prest-Labour system, by aid of which the Germans carried on their invasion and conquest of France in the late war, will serve best to give an adequate idea of the sufferings which this part of the practical rights of a victorious belligerent inflicts upon the private individuals of a community—that is, on those members of it who are presumed to be wholly unaffected by the war, according to the novel theory.

Extreme cases.

1st. Burial of the dead.

Preparation of batteries.

Common case.

Forced labour in road-making, and in transport of stores.

Belligerent Rights over private persons and property in Maritime Warfare.

507. It now becomes my duty to speak of the rights of belligerents over private shipping, crews, and cargoes. There are important distinctions between Land Warfare and Maritime Warfare. The strict old war-code as to liability to capture is unimpaired at sea. No secondary milder set of rules has grown up with regard to it, like the modern usages which (subject to the all-important exceptions of military or political necessity) are now generally followed in the operations of armies on land. And if we try the question by Montesquieu's canon, we shall find that there is good ground for the distinction, inasmuch as a belligerent State's "true interest" (that is, its interest in weakening its enemy so as to compel him to desist from wrong) justifies and requires a uniformity and a greater degree of severity in warfare on the waters, than are commonly justified by the necessity of the case in military operations ashore.

Distinctions between the practice in naval warfare and that in land warfare. Ancient strictness of Laws of War is retained at sea.

Reason for the distinction.

Authorities as to the existence of this distinction.

508. The weight of the authorities which may be cited in proof of the existence of the distinction of which we speak, is indisputable. I will cite some of them, beginning with the brief, but very emphatic statement of Martens. "In maritime wars the private property of the enemy's subjects is never spared"*. Chancellor Kent says, "There is a marked difference in the rights of war carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken or destroy the foundations of his naval power. The

Martens.

Chancellor Kent.

* Martens, p. 289.

capture or destruction of private property is essential to that end; and it is allowed in maritime wars by the law and practice of nations"*. Wheaton, in his 'Elements of International Law'†, records the distinction, and he mentions some of the reasons for it. His own words are as follows:—"Les progrès de la civilisation ont lentement mais constamment tendu à adoucir l'extrême sévérité des opérations de la guerre sur terre; mais cette sévérité existe encore dans toute sa rigueur dans la guerre maritime. Dans cette dernière la propriété privée de l'ennemi prise en mer, ou dans les ports, est sans distinction susceptible de capture et de confiscation. Cette dissemblance dans les opérations des lois de la guerre sur terre et sur mer a été justifiée par l'usage allégué de considérer comme butin la propriété privée enlevée dans les villes prises d'assaut. Le fait bien connu que des contributions sont levées sur les territoires occupés par une armée ennemie, au lieu d'une confiscation générale de la propriété appartenant aux habitants, sert encore de justification. Et puis l'objet de la guerre sur terre étant la conquête ou l'acquisition d'un territoire devant être échangé en équivalent d'un territoire perdu, la considération du vainqueur pour ceux qui vont être ou ont été ses sujets l'empêche naturellement d'exercer ses droits extrêmes dans ce cas particulier, tandis que le but des guerres maritimes est la destruction du commerce et de la navigation de l'ennemi, qui sont les sources et les nerfs de sa puissance navale. Et ce but

Wheaton.

* Kent's Commentaries, vol. i. p. 100 (edit. 1858).

† Part iv. chap. 2, p. 17 of vol. ii.

ne peut être atteint que par la capture et la confiscation de la propriété privée."

Heffter.

According to Heffter no incontrovertible theory can be traced in modern international jurisprudence as to the liability of ships and of their cargoes to capture. But he maintains the practical and universally practised rule to be, that "Tous les biens qui se trouvent sur mer, qu'ils appartiennent au gouvernement ou à des particuliers, sont regardés comme une bonne prise échue à la partie ennemie, dès qu'elle parvient à s'en emparer." He adds a statement of his belief that "On ne prétendra certainement jamais contester à une puissance engagée dans une guerre, la faculté de s'emparer de navires, qui appartiennent soit a l'État, soit à des sujets ennemis, ainsi que de leurs cargaisons. Aucune nation n'est tenue de laisser ouvertes les routes de mer qui peuvent faciliter à ses ennemis les moyens de prolonger la lutte, ni de permettre la continuation d'un commerce préjudiciable au sien. Sontenir le contraire, ce serait défendre une chimère"*. President Woolsey indulges a hope that this "pious chimera" will one day be realized; but he admits that "the fact meanwhile is, that on the sea, property of the enemy's subjects in their ships is lawful prize, unless secured by a special permit"†.

Woolsey's admissions.

* Heffter, Droit International, pp. 262, 266.

† Woolsey's International Law, p. 237, sect. 139. Bluntschli also cherishes the same hope (p. 45), but states that "plusieurs puissances maritimes reconnaissent encore aujourd'hui à la marine de guerre le droit de saisir et d'amener les navires, qui sont la propriété de ressortissants de l'état ennemi, et de confisquer les marchandises dites ennemiès

General Halleck's judgment on the subject is as follows*:—"It may be stated as the existing and established law of nations that, when two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all citizens and subjects of the belligerent powers, and of their allies"*. General Halleck.

There is much to note and to value in the general arguments of Sir Travers Twiss respecting the property of subjects being liable to seizure by a belligerent enemy. I will here cite so much of his enunciation of the law on the subject as specially applies to ships and their cargoes. As he states, such movable property is liable to capture "when it is found on the High Seas," there being no juridical impediment *ratione loci* to a belligerent seizing the property of his enemy in a place which is *nullius territorium*. Sir Travers Twiss.

"If a belligerent cruiser accordingly meets a merchant-vessel on the Open Sea, and the vessel or its cargo belongs to an enemy, it is consistent with the primary object of all war that the belligerent should do justice to himself by taking possession of his enemy's property and converting it to his own use. Property so taken by a belligerent from an enemy on the high sea is termed prize (*prise*) of war, whilst property

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trouvées à bord de ces navires" (p. 373, par. 665).

* Halleck, p. 472.

taken from an enemy on land is termed booty (*butin*) of war. When movable property is found in the territory of an enemy, the *locus in quo* determines the right of a belligerent to take possession of it, for every thing which is in the territory of an enemy is *primâ facie* appurtenant to his territory, '*Quicquid est in territorio, est de territorio*;' but as the open sea cannot become the territory of any nation, no similar rule can determine the right of a belligerent to take possession of a ship or its cargo on the open sea; and the ownership of the property thus becomes the test of its liability to make good the damages and expenses of the belligerent, and of his right to take possession of it"*.

Manning.

In Mr. Manning's chapter on "The Rights of a Belligerent," after mentioning the chief modifications of the old extreme right to seize enemy's property, which are now generally adopted in land warfare, and after observing that "In maritime warfare no such moderation has ever been practised," the author says, of "the practice of States in subjecting to confiscation the property of enemies captured at sea, this is partly occasioned by the nature of maritime warfare, of which the object is, in a great measure, the destruction of the commerce of the enemy; and it may partly result from the connexion between piracy and maritime warfare which formerly existed. But, whatever may be the cause of the practice, such is the fact; the most rigorous construction of the rights of war has always been applied to the private property

* Travers Twiss, p. 142.

of enemies found at sea, the positive Law of Nations being determined on this point by the constant and uniform practice of all States in all ages "*.

509. The general purport of M. Hautefeuille's discussion of this subject has already been brought to the attention of the reader of the present treatise. I now subjoin in a note some of the most important passages on the subject which are to be found in his work on the Rights and Duties of Neutrals in time of Maritime War†. Hautefeuille.

* Manning, p. 183. Prof. Sheldon Amos's edition.

† "Le belligérant a le droit de nuire à son ennemi, par tous les moyens qui sont en son pouvoir; mais seulement par les moyens directs. Il ne peut, ainsi que je l'ai expliqué, employer ceux qui, pour arriver à son adversaire, doivent nuire d'abord à un peuple neutre. Ce principe est absolu et sans exception; mais il est un moyen direct de nuire à l'ennemi, qui est repoussé par le droit de la guerre terrestre, et permis dans les guerres maritimes; je veux parler de la conquête et de la destruction des propriétés privées, appartenant aux sujets des belligérans. Dans les expéditions sur terre, il est reconnu, par tous les peuples civilisés, que ces propriétés doivent être respectées, le vainqueur ne les regarde pas comme un fruit de la victoire; il ne s'en empare pas, il ne dépouille pas le propriétaire, pour transmettre ces objets à ses sujets, ou les confisquer à son profit. Il peut sans doute frapper les propriétés de contributions de guerre, leur imposer de lourdes charges; mais la conquête ne dépouille pas le citoyen du pays conquis, des biens qu'il possédait avant l'invasion. Dans les guerres maritimes au contraire, le belligérant, d'après la règle admise par toutes les nations, a le droit de s'emparer des biens meubles des sujets ennemis. Les navires marchands appartenant aux négocians de l'autre partie, sont poursuivis, attaqués et enlevés, bien qu'ils ne soient pas armés, bien qu'ils soient des possessions privées. Ces navires capturés en mer sont regardés comme la propriété du preneur. Le jugement qui déclare la prise valable, transmet, sinon le droit

510. Although I differ from Mr. Dudley Field as to recommending the adoption of the proposed new

de propriété lui-même, du moins la possession régulière, je dirai même légitime au vainqueur."

"L'usage suivi sur mer me paraît le seul conforme à la loi primitive, d'après laquelle le belligérant a le droit de nuire à son ennemi, par tous les moyens directs qui sont en son pouvoir. L'ennemi est une nation, composée d'un nombre plus ou moins considérable de citoyens, qui tous réunis forment le corps de cette nation, l'ennemi : nuire à chacun des membres, c'est nuire au corps luimême, à la nation, à l'ennemi ; c'est l'affaiblir. La capture des navires marchands, ennemis, quoique désarmés ; la prise des équipages qui les montent, des marchandises qu'ils portent, est un moyen de guerre licite, non-seulement d'après l'usage des nations, mais d'après la loi primitive.

"Un sentiment d'humanité, ou pour parler plus juste, l'impossibilité matérielle d'en agir autrement, peut-être même ces deux causes réunies, ont porté les peuples à adoucir la loi primitive, lorsqu'il s'agit des propriétés reposant sur le sol conquis, ou seulement envahi par les armées. L'humanité sans doute a pu dicter cet usage de la guerre terrestre, mais l'intérêt du conquérant, le danger, l'impossibilité d'en agir autrement, de dépouiller tous les sujets du pays envahi, de les constituer prisonniers de guerre, est le principal motif qui a fait adopter cette modification du droit primitif de la guerre. Ce n'est pas que je ne trouve très désirable de voir cette jurisprudence adoucie adoptée également dans les guerres maritimes ; mais je ne puis partager l'étonnement, je dirai même l'indignation de quelques-uns des publicistes qui ont traité cette matière. Quel que soit ce désir, je ne saurais admettre que le droit de la guerre, d'après la loi primitive, impose au belligérant le devoir de respecter les propriétés privées ennemies."

M. Hautefeuille then argues that belligerents abstain from general confiscation of private property on shore, when it comes into their power, chiefly out of regard to their own interests. An invader who stripped a whole population of their goods and crops would be sure to raise the whole population in arms against him.

So with regard to the rights given by war over the persons of those who are members of the hostile community:—A

rules about the status of private persons in time of war, and the liability of private property to capture

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general does not endeavour to treat all the inhabitants of a captured city, or of a subjugated province, as his prisoners of war, because it is practically impossible for him to confine such multitudes or to remove them. Belligerents also in their treatment of an occupied territory act often under the influence of a purpose or hope of making the territory their own. It is therefore their interest to preserve it in as flourishing a condition as possible. At any rate, they intend to derive as much benefit as possible from it, and for as long a time as possible. In order to obtain this it is good policy for them to abstain from all conduct that will seriously impair its resources and productiveness.

I may observe here that a higher authority than M. Hautefeuille can be referred to as supporting the opinion that the modern relaxations of Rules of War in land operations are greatly due to reasons of self-interest in behalf of the prevalent Belligerent which do not exist in Maritime Warfare. In the debate in the House of Commons on March 17, 1862, on Maritime Law, Sir Roundell Palmer, the then Solicitor-General (now Lord Selborne), used these words:—"The case has been very much exaggerated with respect to the mitigation which Land warfare has actually received. It is perfectly true that such warfare has received much mitigation; but that has taken place as much under the influence of considerations of interest on the part of armies and of the nations which send them forth, as from any consideration of humanity, because we know very well that the best way for an army to maintain itself in the field is to be on good terms with the people of the country which it is occupying. The commissariat could not get supplies if every thing were done in the way which the Hon. Member for Salford suggested would be the result of applying the principles of Maritime Warfare to operations on land. If you always burned, sacked, and destroyed, of course armies would starve, and the operations of war could not be carried on. Reasons of expediency and practical necessity, therefore, have dictated very considerable modifications of the strict and extreme rights which the law of nations vests in armies in the field" (Han-

at sea, I agree with him in considering that the reasons for retaining the old system are best set out

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sard, 3rd series, vol. clxv. p. 1675).

After having pointed out the circumstances in land warfare, which prevent the general seizure of property, M. Hautefeuille discusses, by way of contrast, the circumstances and the incidents of maritime warfare:—"Sur mer, il n'en est pas ainsi. L'impossibilité n'existe pas: le bâtiment dont on s'est emparé, est facilement conduit sur le territoire même du vainqueur, mis en lieu de sûreté. Les hommes peu nombreux formant son équipage, peuvent être faits prisonniers, et gardés dans les États du souverain capteur. Enfin, si la prise peut exaspérer les propriétaires dépouillés, elle ne frappe pas une population tout entière; d'ailleurs, elle ne saurait compromettre la conquête, ni mettre le vainqueur en péril. Elle n'est pas contraire à l'intérêt du vainqueur; en effet, s'il laissait le navire libre de continuer sa route, de se rendre chez l'ennemi, il n'aurait plus aucun droit sur lui, il ne pourrait prélever aucune contribution, tirer aucun avantage, tout serait pour son adversaire. Il y a plus, il a un intérêt puissant à s'emparer du navire, parce que cette conquête affaiblit son antagoniste. Tous les hommes qui forment l'équipage d'un navire marchand, sont aptes immédiatement à équiper les bâtimens de guerre, tous sont marins; en les faisant prisonniers, on diminue les forces navales de leur souverain, parce qu'il est long et difficile de former des hommes de mer. Enfin, tous les navires marchands sont susceptibles d'être transformés en bâtimens de guerre, ou du moins en corsaires; d'où il résulte que leur prise est importante pour le belligérant, puisqu'elle augmente sa force et diminue celle de son ennemi. Ainsi, sur mer, l'impossibilité de suivre le droit rigoureux de la guerre n'existe pas, et les belligérens ont un intérêt puissant à son application.

"C'est par ces motifs, à mon avis, que le droit primitif de la guerre a continué à être exercé dans toute sa rigueur sur mer. La confiscation de la cargaison se justifie par les mêmes moyens. Sans doute l'intérêt est moins grand, mais il n'y a aucune impossibilité, il n'y a aucun danger pour le capteur à s'emparer de ces propriétés ennemies; elles suivent le sort du navire qui les porte. Il serait, d'ailleurs, souvent difficile de

by Ortolan; and I gladly avail myself of the American Jurist's able summary of the French writer's arguments. Mr. Field says*, "The chief arguments on this question which still deserve consideration are perhaps more completely indicated by Ortolan (Diplomatie de la Mer, liv. iii. ch. 2) than by any other author.

Reasons for the distinction as set out by Ortolan.

"After alluding to the reasons of humanity, and of commercial interest, on which the protection of private property at sea has been urged, and raising the inadequate objection, that some other severities of war are still more obectionable in these respects, and replying to the argument that the rule of justice must be uniform, by saying that the land and the sea are so different that the one cannot afford a rule for the other, he defends the right of capture at sea upon the following grounds:—

"I. The object of war is to compel a peace by injuring the enemy; and on land the military power may impose requisitions and levies on the inhabitants, which, in fact, are only convenient modes of seizing

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restituer la cargaison à ses propriétaires, en s'emparant du bâtiment. La loi naturelle de la guerre a dû conserver toute sa force à l'égard des marchandises ennemies chargées sur le navire ennemi, comme sur le navire lui-même. Telle est, à mon avis, la véritable raison de cette différence dans les usages de la guerre terrestre et maritime. L'humanité, sans doute, a pu exercer une heureuse influence sur l'adoption des restrictions apportées au droit primitif, mais elle n'en est pas la seule source. On sait trop que les nations en guerre sont peu disposées à écouter la voix de ce sentiment."

* Draft Outlines of International Code, by Dudley Field, p. 526.

private property, and cannot be substituted at sea for individual capture.

"II. If war at sea were to be restricted to the naval forces, it would be impossible to injure the enemy there, he keeping his ships of war in port, and meanwhile he might carry on intercourse by private ships with impunity.

"III. The capture of a ship and cargo is not like the confiscation of a warehouse of goods; for the ship and seamen are potentially an auxiliary of the naval forces of the nation, and constitute a means of extending its power beyond its proper territory.

"IV. The doctrine of the freedom of the seas favours the right of capture; for since a belligerent cannot take possession of the sea and hold it as a territory, he can only take the ships he finds there; and as by occupying territory he may interfere with the territorial power of his enemy, so at sea, by capturing ships, he may interpose against his enemy's right of passage on the seas.

"V. The land-rule does not leave non-combatants free to carry on an unrestricted commerce on the territory within military occupation, but it forbids trade, it makes personal property inviolable only for a sufficient time to allow its sale or removal; and the continued protection of the title to real property is a principle inapplicable to ships, which are personal property.

"VI. Without capture of private property war at sea would be imperfect, and, in so far, interminable.

"And, finally, he concludes that it is a question of

conflict between national and private rights, and that private rights, being the less important interest, must yield so far as incompatible with the greater interest.

"The solution which he suggests is the maintenance of the right of capture, both of ship and cargo, together with a partial protection of private right, by a restoration of the value of the goods, in specified cases, to be made either immediately or at the termination of the war.

"The one exception which he recognizes is that of the vessels &c. of coast fisheries, when they serve chiefly as the means of subsistence of inoffensive inhabitants, and have no public and general importance.

"Dana (in a note to Wheaton) earnestly advocates the practice of warring on commerce, declaring that, in his opinion, it is the most humane, and often the most efficient part of war, and the least objectionable part. 'It takes no lives, sheds no blood, imperils no households, has its field on the ocean, which is a common highway, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels; but a grand valiant appeal to force, to secure an object deemed essential when every other appeal has failed'"*.

Reasonings of Dana in favour of the distinction.

511. Mr. Dudley Field meets this reasoning by arguments which mainly rest on the proposition,

Mr. Dudley Field's arguments *contra*.

* Dana's 'Wheaton's Elements of International Law,' p. 876.

"That War is now a relation between State and State only, and that private property is therefore to be respected"*. If this proposition fails (and sufficient attention has already been paid to demonstrating its fallaciousness), the arguments based on it fall to the ground also. The assumption that this proposition is true, this *Petitio Principii* is common to all the advocates of the abolition of the old maritime rights of a belligerent against enemy's merchant-ships and their cargoes. Among the writers on this side of the question, the ablest appears to be M. De Laveleye, the distinguished Jurist of Belgium. His work, entitled "Du Respect de la Propriété Privée en temps de guerre," has justly obtained general and respectful notice. He follows much the same line of reasoning; and he cites and adopts many passages from the State Papers, by which Mr. Marcy, the American Secretary of State in 1856, sought to justify the refusal of his Government to concur in a renunciation of the right to employ Privateers. Mr. Marcy and M. Laveleye both assume that the proposition of Portalis in favour of the general inviolability of private property is now an established maxim; and they further assume that the States, which in 1856 joined in the Declaration of Paris against Privateering, did so on the Portalis principle of excepting private property from seizure. If these points are conceded, their inferences that we ought to go further and exempt merchant-ships and cargoes from all hostile capture, would be very plau-

Arguments of M. De Laveleye,

and of Mr. Marcy.

They assume the accuracy of the Portalis theory.

They misunderstand the motives from which the Signataries of the Treaty of Paris renounced Privateering.

* Proposed New Code of International Law, p. 529.

sible. But the avowed and the notorious motive on which the Powers acted that signed the Declaration of Paris against Privateering, was the extent and the enormity of the abuses which are invariably found to accompany the practices of Privateers, in neglect and in contempt of the rights of neutrals, of the laws of war, and of the principles of humanity—abuses which for centuries have been topics of complaint by statesmen and jurists of all civilized nations. As for any complete or effective sanctity of private property being really practised in land-warfare, Mr. Marcy's writings in 1856 are best answered by looking to the acts of his countrymen in their war of 1860–65, a contest which, although a Civil War, is considered both by the Americans themselves and foreigners to have been conducted with fair respect for the received laws and usages of civilized warfare*. In 1864 the Federal General Sherman, in his memorable expedition from Tennessee to the Atlantic seaboard, captured from the Confederates the important city of Atlanta. The city was surrendered to him without any resistance by its municipal authorities. He considered that "the exigencies of the service required that the place should for the present be appropriated exclusively for military purposes; and orders were immediately issued for the departure of all civilians, both male and female, excepting those in the employment of the Government"†. Besides thus expelling the inhabitants, the

Mr. Marcy's assertions of the sanctity of private property disproved by the conduct of his own countrymen in the war of 1860–65.

Instances of this. General Sherman's treatment of the citizens of Atlanta.

* See Prof. Abdy's edition of Kent, p. 245.

† Military and Naval History of the Rebellion, by T. Tenney, p. 545.

Federal General "burned every thing in the place except the churches and dwelling-houses"*.

His reply to their remonstrances.

512. When the order for the expulsion of the inhabitants was given, their local magistrates sent a letter of remonstrance to General Sherman, pointing out the amount of suffering to helpless non-combatants which it would cause. Some parts of the reply of the Federal Commander deserve attention, especially as it is evident from the recently published memoirs of General Sherman, as well as from other authorities, that he is an officer of high honour and of humane disposition. He told the citizens of Atlanta, "I cannot revoke my order. I have to prepare for a future struggle in which millions, yea, hundreds of millions of good people outside of Atlanta have a deep interest. We must have peace, not only in Atlanta, but in all America. To have peace, the rebel armies must be defeated. To defeat them, we must reach them in their recesses. My military plans make it necessary for the inhabitants to go away; and I can only renew my offer of services to make their exodus in any direction as easy and comfortable as possible.

Military necessity must rule.

"War is and must be cruelty."

"*War is cruelty, and you cannot refine it.* Those who brought war on our country deserve all the curses and maledictions a people can pour out. I had no hand in making this war; and I will make more sacrifices this day than any of you to secure peace. But you cannot have peace and a division of our country. We don't want your negroes, or your houses, or your

* Draper's History of the American Civil War, vol. iii. p. 306.

land, or any thing that you have; but we do want, and will have, a just obedience to the laws of the United States. That we will have, and if it involves the destruction of your improvements, we cannot help it"*.

His devastation of Georgia.

513. Afterwards General Sherman, in his march through Georgia, supported his army on the resources of the country; and he sought at the same time to exhaust those resources, and to weaken the hostile Georgians as much as possible. I will describe his system of operations in his own words. His report to President Lincoln states, "We have consumed the corn and fodder in a region of country thirty miles on each side of a line from Atlanta to Savannah, as also the sweet potatoes, cattle, hogs, sheep, and poultry. We have carried away more than ten thousand horses and mules, as well as a countless number of slaves. I estimate the damage done to the State of Georgia at a hundred millions of dollars, at least twenty millions of which has inured to our advantage; and the remainder is simply waste and destruction. This may seem a hard species of warfare; but it brings the sad realities of war home to those who have been directly or indirectly instrumental in involving us in its attendant calamities"†.

General Sheridan's devastation of the Shenandoah valley.

514. On another scene of the same widely extended contest between the Federals and the Confederates, General Sheridan, who commanded for the Federals on the Upper Potomac, was ordered, in September 1864, to lead his troops along the Shenandoah valley,

* Draper, vol. iii. p. 306. † Ibid. p. 338.

a fertile district between the Potomac and the vicinity of James River, through which expeditions of the Confederates had been made several times during the war, so as to influence the great and long-continued conflict which was waged near Richmond, and so as more than once to menace Washington. The inhabitants of this district were keen and determined Secessionists; and it was by their active aid and cooperation that the Confederate expeditions in those regions had been effected. The Federals determined to prevent the recurrence of any similar movement by laying waste the country which was so loyal to their adversaries. This was done by General Sheridan's army. His *modus operandi* is thus described by the strongly Federalist historian, Dr. Draper. "He now proceeded to carry out Grant's instructions respecting the devastation of the valley. His cavalry spread across its entire breadth; and so thorough was the destruction that it was said, 'If a crow wants to fly down the valley he must carry his provisions with him.' Sheridan himself reported that 'The whole country, from the Blue Ridge to the North Mountain, has been rendered untenable for a rebel army. I have destroyed over 2000 barns filled with wheat, and hay, and farming-implements, over 70 mills filled with flour and wheat; I have driven in front of the army over 4000 head of stock, have killed and issued to the troops not less than 3000 sheep. A large number of horses has also been obtained.'

"The devastation of the valley was a severe measure; but its inhabitants were bitterly hostile to the

Government; they had promoted as much as they could every Confederate expedition against Washington; indeed without their assistance it was scarcely possible that such expeditions could be made"*.

515. There was certainly here little heed paid to the supposed inviolability of private property; nor can we find any recognition of a theory that individual citizens had nothing to do with the war, and that consequently the war should have nothing to do with them. The belligerents acted on the principle declared in a manifesto of December 1, 1862, by Mr. Secretary Stanton (already cited in this volume), that "No aphorism is more universally received than that the sole object of a just war is to make the enemy feel the evils of his injustice, and, by his sufferings, amend his ways; he must therefore be attacked in the most accessible quarter"†.

The principle followed was not Secretary Marcy's but Secretary Stanton's.

516. But while we must deny that the distinction between States and their component members as to belligerency, and as to liability to feel the effects of war, has ever been established on land so as to serve as a sound basis for arguments why the property and persons of private individuals should be exempt from war-risks at sea, it is not to be questioned, and it has not been questioned in these pages, that an amount of mitigation of war-hardships has become usual on shore, to which there is nothing analogous in maritime operations. The causes for these differences have been

Still there is an admitted difference between sea-practice and land-practice.

* Draper, vol. iii. p. 411.

† See 2 Draper, p. 581, and p. 388 *suprà*.

repeatedly set out, or adverted to; but as the topic is one of much importance and interest, I will refer to one more source of very valuable light on the subject—I mean the debate in the House of Commons on Maritime Rights, which was caused by the proposal of a resolution by Mr. Horsfall, on March 11, 1862 (the debate being continued on the 17th of the same month), and in which the question contested was, whether England ought to abandon the right of capturing private ships and cargoes in time of war*. The speeches delivered in that discussion by Sir G. Cornwall Lewis, by Mr. Spencer Walpole, by Lord Palmerston, and, above all, by the Solicitor-General, then Sir Roundell Palmer, now Lord Selborne, will amply repay perusal. Sir G. C. Lewis very forcibly pointed out what a powerful engine for despoiling and for weakening a hostile nation is given on land by the system of levying contributions, to which nothing analogous exists or can exist at sea. If it were not for the enemy's right to seize ships and cargoes, private property at sea would be privileged immeasurably beyond private property ashore. In part of this speech he said, "There is another important distinction between land and maritime warfare, upon which the whole question may be considered to turn. When you conquer a country you conquer its Government; you have then conquered that engine by which the country may be plundered." Sir George illustrated this by referring to the enormous sums which Napo-

Valuable light on the principle of this distinction to be found in the House-of-Commons debate in March 1862.

Reference to Sir Cornwall Lewis's speech.

* See Hansard, 3rd series, vol. clxv. p. 1359 *et seq.* and p. 1599 *et seq.*

leon I. compelled Prussia to pay in the war of 1807–1808*. He then proceeded to observe, "With regard to the sea, there is no similar engine. There is no Government which exercises any such power at sea. The sea is merely the highway of nations. It is not the subject of Government or of sovereignty; and the only way in which a belligerent can exercise any control over the property of enemies floating on the sea is by capture by means of armed ships."

517. Sir Roundell Palmer thus powerfully and conclusively crushed the Portalis paradox about war not concerning private citizens.

Sir Roundell Palmer's demolition of the Portalis paradox.

"If there be any principle of the law of nations more cardinal than another, it is that in war Governments are identified with their people, that you cannot make war upon the Government and have peace with their people, that the people are bound up with the Government and the public interests of the nation for better or worse. All the great writers on the subject have laid down that principle; they have said that the property of the individual, as part of the property of the nation, is responsible for the liabilities of the nation in a question with the foreign belligerent—that the nation and the individuals who compose it are one and the same, and no distinction is to be made between the aggregate and the individuals."

Rules as to Maritime Capture and its incidents.

518. We now have to consider certain rules which

* They amounted, according to the accounts of Napoleon's own commissioner, Count Daru, to twenty-four millions sterling, being four times the amount of the whole ordinary annual revenue of the country. See Alison, vol. vi. p. 304.

govern the taking and the confiscation of property liable to hostile capture at sea, and which in many points differ from the rules and customs as to a belligerent's right to seize property on land. The very terms which are applied to the subject-matters of capture are distinct. Property taken on land is called "Booty;" property taken at sea is called "Prize." The law as to Prize is administered by special courts called "Admiralty Courts," or Prize Courts*, which have long been instituted in civilized countries, and which are commissioned by the Sovereign Powers of those countries to take cognizance of most naval matters, and particularly of all questions as to legality of capture, and its incidents, as to what property is or is not lawful prize, as to its disposal, and as to the various rights and claims connected with it.

Prize Courts.

519. It is usual among civilized States for the Sovereign Power to issue a proclamation to its Admiralty Courts with directions as to their hearing and making judicial determination respecting ships and cargoes taken from the enemy. Of course, no State can give its own Prize Courts any authority which is contrary to the law of nations; but it may empower them to deal with matters which that Law does not determine; such, for instance, as the division and appropriation of prize-money. The general rule of International Law is that the property in prizes rests in

General powers and usages of Admiralty Courts.

* See, as to the origin of Admiralty Jurisdiction in general, Sir Travers Twiss on Duties and Rights of Nations in Times of War, 2nd ed. vol. ii. p. 136, and p. 142 and the subsequent pages.

the Sovereign State—"*Parta bello cedunt reipublicæ*;" but the local laws of each State may, and frequently do, provide that the actual captors shall receive specified portions of the proceeds of the capture. In default of being instructed by any such special proclamation or enactment issued by the sovereign body of their State, the Admiralty Courts of a belligerent proceed according to the known and established usage of Admiralty law, and according to the law of nations*.

By whom Maritime Warfare is carried on.

520. Maritime warfare is now and for several centuries has been principally carried on by public ships of war, commissioned by the sovereign power of the Belligerent State, and officered and manned by those who are in the regular service of the State. But the practice has also existed and cannot be regarded as extinct, of a State authorizing private persons to fit out armed vessels at their own risk, and to carry on a war of depredation against the enemy's commerce for their own pecuniary benefit. War-vessels of this kind are called "Privateers." A Privateer, though owned, commanded, and manned by private persons, must have a commission from the State against whose enemies she acts, which commission authorizes her to seize and take the ships and goods of the hostile belligerent. It is this commission, and this alone, that gives the Privateer her right to use violence and to take prizes; and it has been usual for civilized Powers, when employing this kind of naval force, to regulate

Of Privateering.

* See Travers Twiss, pp. 335, 336, 340; and Lord Stowell's judgments there referred to; and see Manning, p. 472.

and check as far as possible the conduct of private cruisers, by issuing strict instructions to them, and by making their owners give bonds with heavy penalties for their observance of those instructions. But it has been always found in practice that privateering is attended with gross abuses: it is carried on by men who enter into it solely for the sake of plunder; both officers and crew are in general inferior in personal character to members of the State's regular navy; and they are not influenced by any regard for the general character of an honourable profession. Their discipline is lax; they have many means and occasions for committing acts of rapaciousness and cruelty without the risk of immediate detection and exposure; and they are generally found to think more of gratifying their own cupidity than of observing the rights of neutrals or the common laws of humanity*. Consequently many attempts have been made to abolish Privateering by general consent of nations.

Gross abuses attendant on Privateering.

521. The latest and greatest measure of this kind was "the Declaration of Paris" in 1856, when the Plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey signed a manifesto containing certain propositions relating to Maritime Law. The first of these proclaimed that "*Privateering is and remains abolished.*" This alteration of International Law could, of course, only be binding on the Powers that consented to it; and the Declara-

Attempt made to abolish Privateering by the Powers that signed the Treaty of Paris.

* See the opinions on this subject professed by numerous writers on International Law, cited in Woolsey, p. 29, and in Halleck, p. 392.

tion contained a statement to that effect*. It was communicated to other States; and in Europe it met with universal acceptance, except from Spain. In America it was adopted by Brazil, Chili, the Argentine Confederation, Ecuador, Guatemala, Hayti, and Peru. But the great maritime and commercial Power of the West, the United States, refused to concur in the abandonment of the right to commission Privateers, unless there was a further agreement to exempt henceforth the private property of the subjects of a Belligerent Power from seizure by the public armed vessels of the enemy, except in cases of contraband of war. This topic has been already discussed in this chapter†.

This agreement is generally adopted, but is rejected by the United States.

522. The right of maritime capture would be of little practical value, if the war-ships of a belligerent had not also, in time of war, the right of visiting and searching the merchant-ships which they meet with, in order to ascertain their real nationality. If this were not so, the mere use of a neutral flag would give unlimited protection to hostile ships and cargoes. But the branch of the International Law which deals with visitation and search, is much more important with regard to the rights and the liabilities of Neutrals than as to any jural questions that can arise between

Right of Visitation and Search.

* As to the effect of the Declaration of Paris, if one of the Signatary Powers should be engaged in war with a Power which has not become a party to that Declaration, see Travers Twiss, p. 423.

† The other provisions of the Declaration of Paris will be spoken of in the next chapter, when we consider the effect of war on the rights and duties of neutrals.

one hostile Power and its adversary. I will therefore defer the consideration of this topic to the next chapter; and I will, for the same reason, defer entering on the important and interesting subjects of whether the enemy-character of the ship, in which the goods of a neutral are conveyed, is communicated to such goods; and whether, on the other hand, enemy-goods are privileged from seizure, if found on board a neutral ship. I shall also in that chapter deal with the subjects of contraband and blockade, and of the illegality of carrying on hostile operations within the ports or territorial waters of a neutral. At present I speak only of the simple case in which a public ship of war captures an enemy-ship and cargo on the high sea, or in its own or in the enemy's territorial waters.

Of bringing in a prize for adjudication.

523. It is the duty of the captor to bring his prize, as soon as conveniently may be, within the jurisdiction of a prize-court of his own State. The Admiralty Courts (or Prize-Courts) of a belligerent State may be held at any port or convenient place in the territory of the State itself, or of another State which is its ally in the war; but it must always be a court of the captor's own State*. The Prize-Court of an ally cannot legally condemn the captured property as lawful prize; and it is never lawful for a Prize-Court to carry on its proceedings in a neutral country. Chancellor Kent observes, that "Prize or no Prize is question belonging exclusively to the courts of the country of the captor. The reason of this rule is said to be, that the Sovereign of the captors has a right to

Only the captors' courts can adjudicate on "Prize or no Prize."

*. Abdy's Kent, p. 274.

inspect their behaviour, for he is answerable to other States for their acts "*.

524. It is usual, and it is desirable, that the captured vessel shall be taken to the port where the Prize-Court is sitting, which is to adjudicate respecting her. But this is not invariably necessary. The Court may have jurisdiction, although the prize is lying in a neutral port. In an American case, where this point was raised, Mr. Justice Taney said:—"A Prize-Court may always proceed, *in rem*, whenever the proceeds of the prize can be traced to the hands of any person whatever. As a general rule it is the duty of the captor to bring it within the jurisdiction of a Prize-Court of the nation to which he (the captor) belongs, and to institute proceedings to have it condemned. But there are cases where, from existing circumstances, the captors may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficent crew to man the captured vessel, or where the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States"†.

Cases when the captured vessel need not be sent into the Port of Adjudication.

525. It is not likely that there will be hereafter many cases of prizes being left in neutral ports while proceedings respecting them are being taken in

* Abdy's Kent, p. 274.

† See Jackson *v.* Montgomery, 13 Howard, p. 115, cited in Abdy's Kent, p. 276.

a port where an Admiralty Court of the captor's nation is sitting, inasmuch as it is becoming usual for neutral Powers to issue proclamations forbidding the bringing of prizes into their ports by the war-ships or privateers of either belligerent; but the destruction of the captured ships and cargoes of an enemy at sea, without any attempt to bring them into port, has been and is sure to be again extensively practised by the cruisers of a nation whose naval force is numerically inferior to that of its antagonist. It was the regular system on which the Alabama and other war-ships of the Confederates acted during the late Civil war; and when complained of, it was justified by citing the example set by the United States in their war with England in 1812 and 1813. Chief Justice Cockburn, in his judgment in the Geneva Arbitration, says of this system, that, "however revolting such a system of warfare, it is still within the stern principle of international law, relative to war, which justifies both the seizure and the destruction of enemy's ships and goods at sea, on the principle that whatever tends to impoverish the enemy is allowable. The practice had been sanctioned by the conduct of the United States themselves, in their last war with Great Britain"*.

An enemy's ship and cargo may be summarily destroyed by the captors.

Practice of the Confederate cruisers in the late American Civil War.

Practice of the United States in the war of 1812.

526. In the same judgment passages are cited from the instructions issued by the American Navy department to their officers in 1812, commanding most emphatically the adoption of "*the destructive plan*" towards the British merchantmen and cargoes†.

Instructions of the American Navy Department to adopt "the destructive plan."

* Blue Book, p. 91.

† "The great object is the destruction of the commerce of the enemy, and the bringing

Of Ransoms.

527. It frequently happens that captors at sea, who are under no orders from their own Government to destroy summarily all that they take, and who have regard to their own pecuniary interest, and also to maintaining the efficiency of their ship for further cruising operations, find it convenient to let their prize go free again on condition of a ransom being paid for her release. This is done by a formal instrument of

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into port the prisoners, in order to exchange against our unfortunate countrymen who may fall into his hands. You will therefore man no prize, unless the value, place of capture, and other favourable circumstances shall render safe arrival morally certain. You will not agree to the ransoming of any prize. Grant no cartel nor liberate any prisoners except under circumstances of extreme and unavoidable necessity.

"The commerce of the enemy is the most vulnerable point of the enemy we can attack, and its destruction the main object; and to this end all our efforts should be directed. Therefore, unless your prizes should be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in; the chances of recapture are excessively great; the crew, the safety of the ship under your command, would be diminished and endangered, as well as your own fame and the national honour, by hazarding a battle after the reduction of your officers and crew by manning prizes. In every point of view, then, it will be proper to destroy what you capture, except valuable and compact articles, that may be transhipped. This system gives to one ship the force of many.

"A single cruiser, if ever so successful, can man but a few prizes, and every prize is a serious diminution of her force; but a single cruiser destroying every captured vessel has the capacity of continuing in full vigour her destructive power, so long as her provisions and stores can be replenished, either from friendly ports or from the vessels captured. * * * * Thus has a single cruiser, upon *the destructive plan*, the power, perhaps, of twenty acting upon pecuniary views alone."

Ransom-bills.

agreement, called a Ransom-bill, drawn up between the captor and the master of the captured vessel. The latter binds himself and the owner of the ship and cargo to pay a certain sum of money on a day named in the bill. For this he receives a license for the ransomed vessel to proceed in safety to a stipulated port within a prescribed time, and with limitations as to the route which he is to take. While the released ship is on her voyage thither she is secured by the ransom-bill against further molestation by war-vessels or privateers of her captor's State, or of any State in alliance with it. Some nations (including Great Britain) prohibit their subjects from giving or receiving ransom-bills; but the contract is valid according to general International Law; and ransom-bills may be enforced by action in the courts of States which have not prohibited them by their municipal laws*.

Ransom forbidden by the municipal laws of some States.

Of recapture, and the "*Jus postliminii*."

528. A ship that has been captured by an enemy, may be recaptured by a friend; and in such cases it becomes necessary to consider whether the original owner's right of property is to be considered as having survived the temporary hostile domination, or as having been born again, or whether the vessel, when wrested out of the enemy's possession, is to be considered as a prize taken from the enemy; which last would seem to be the logical way of regarding it, although the working out of such a theory would practically enrich the recapturing party at the expense of their own fellow-countrymen. In order to obviate this hardship,

* Kent (Abdy's edition), p. 321; Travers Twiss, p. 356; Woolsey, p. 240.

International Jurists have borrowed from the Roman Law its celebrated legal fiction of the "*jus postliminii*;" though the application of it by modern Publicists is by no means identical with what we read of it in the ancient Jurisconsults, in whose time the "*jus postliminii*" was chiefly important on account of its effect on the *status* of Romans who had been made prisoners of war by a foreign enemy, but who afterwards returned to Roman territory*. A general description of the *Jus Postliminii* has already been given in this chapter†. With regard to maritime captures and recaptures the questions which arise as to when and under what circumstances recaptured ships and cargoes may be reclaimed by their original owners "*jure postliminii*," on condition of paying prize-salvage to those who have rescued them, are questions which affect almost exclusively members of the same State; and they are consequently regulated by the municipal legislation of each State on the subject‡.

Of Licenses to trade.

529. Property may be protected either by land or by sea from capture, to which it would otherwise be liable, by the grant of Licenses to trade. As a general rule one effect of war breaking out between States is "the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries." These are the words of Chancellor Kent, who further

* Woolsey, p. 243.

† P. 510 *suprà*, and notes.

‡ Manning's 'Law of Nations,' p. 192, Sheldon Amos's edition.

observes, that "the idea that any commercial intercourse or pacific dealing can lawfully subsist between the people of the Powers at war, except under the clear and express sanction of the Government, and without a special license, is utterly inconsistent with the new class of duties growing out of war"*. When, for exceptional and temporary reasons, a license to carry on a specific trade or branch of commerce is granted, it is usual to specify the places between which and the parties by whom this may be done, and also the time during which it may be done, the particular branch of trade or commerce, and the necessary regulations and formalities which are to be observed.

Of the plundering of towns taken by storm.

530. It has been my duty to mention in this chapter many proposals for new rules purporting to soften the severity of the laws of war; and it has in some instances been my unpleasant duty to point out reasons against the adoption of proffered innovations. But there is one matter as to which all reasons of humanity, justice, and expediency (as I believe) concur in demanding a reform of an old-established but hideous abomination. I mean the abolition of the practice of giving up towns, which are taken by assault, to be sacked by the victorious soldiery. The Brussels Conference, by the 18th Article, chapter iv., of their recommendations, seek to lay down as a rule, that "A town taken by storm shall not be given up to the victorious troops to plunder."

Reform of the generally received laws of War on this point most desirable.

In passages which have been cited in this chapter, from various Jurists, as to the usages of warfare, there

* Abdy's Kent, p. 204.

are expressions which certainly admit the liability of private property in a besieged town to be seized as booty of war by the conqueror, where resistance has been protracted to the utmost and where the place is ultimately taken by assault. If nothing worse than this ordinarily happened when a town is stormed—if the successful general and his officers preserved discipline among their troops, and protected the persons of the townspeople, the enforcement of the victor's right to booty might be plausibly advocated; though even then we should be bound to remember that in the vast majority of cases the townspeople are not responsible for the prolongation of the defence and for an assault being made necessary: it is the commandant of the garrison and his military advisers by whom alone such matters are determined. It may also be observed that the strict right of war, so far as International Law deals with it, gives the captured property to the Sovereign of the State, whose army takes the town, and not to individual members of that army. The Sovereign might well decline to exercise that right, if it could be enforced only by the armed bands of angry soldiers, excited by the peril and the struggle of the assault, who rush thence to wrest from crouching, vainly hiding citizens every object that excites avarice, and who are let loose to practise any brutality which other passions may prompt amid the defenceless households, which are abandoned to their licentiousness and cruelty. If it is necessary that the modern soldier should be stimulated to go through the special risks of an assault by the hope of special indulgences, a sum

might be raised after the capture by requisition on the property in the town and divided among the troops engaged in the storm, as prize-money is among the crews engaged in a sea-fight. But it is a libel on the armies of modern civilized nations to assert that they need such a stimulus to make them do a soldier's duty, or to regard them in the same light as that in which history teaches us to view the ruffians who made up the Free Companies of mediæval Europe, or those who devastated Germany in the last portion of the Thirty Years' War. Our military historian Napier has denounced this fallacy in his well-known descriptions of the sieges of Ciudad Rodrigo and Badajoz. He says most truly, that "Undoubtedly if soldiers hear and read that it is impossible to restrain their violence, they will not be restrained. But let the plunder of a town after an assault be expressly made criminal by the articles of war, with a due punishment attached; let it be constantly impressed upon the troops that such conduct is as much opposed to military honour and discipline as it is to morality; let instantaneous punishment (death if necessary) be inflicted for such offences. With such regulations the storming of towns would not produce more military disorders than the gaining of battles in the field." General Halleck cites and adopts these opinions.

General Napier cited as to the practicability of abolishing this abuse of warfare.

I will conclude this chapter with an extract from the remarks which the American military publicist adds on the subject, and which are valuable as embodying the testimony of an experienced veteran as well as the judgment of a well-read jurist, and the

feelings of a just and humane man. General Halleck says, "We sometimes hear of a captured town being sacked, and the houses of the inhabitants being plundered, on the plea that it was impossible for the general to restrain his soldiery in the excitement and confusion of storming the place; and under that softened name of *plunder* it has sometimes been attempted to veil 'all crimes which man in his worst excesses can commit—horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them.' It is true that soldiers sometimes commit excesses which their officers cannot prevent; but in general, a commanding officer is responsible for the acts of those under his orders. *Unless he can control his soldiers he is unfit to command them.* The most atrocious crimes in war, however, are usually committed by the militia and volunteers, suddenly raised from the population of large cities, and sent into the field before the general has time or opportunity to reduce them to order and discipline. In such cases the responsibility of their crimes rests upon the State which employs them, rather, than upon the general, who is, perhaps unwillingly, obliged to use them" *. General Halleck cited.

* Halleck, pp. 442, 443.

CHAPTER XII.

Rights and Liabilities arising out of a State of Warfare with regard to Neutrals.

This branch of Law chiefly of Modern Development.—The name formerly unknown: Grotius, Bynkershoek, and Vattel referred to.—Great service to International Law done by the early Rulers of the United States.—Jefferson's Exposition of true Status and Duties of a Neutral.—Kinds of Neutrality.—Natural or Normal Neutrality.—Conventional Neutrality.—Political Condition of Conventionally Neutralized States.—Qualified Neutrality unreal. The real Condition is that of Alliance.—Assistance rendered under it is Hostility towards the other Belligerent, though he may, in his discretion, overlook it.—Attempts to establish "Friendly Neutrality."—Such a Condition is a mere deception.—"Conventional Neutrality" is the only exceptional Neutrality.—Definition of Natural Neutrality.—Determination of Stand-point whence its Rights and Duties are to be regarded.—Views of Belligerent.—Views of the Neutral.—Neutral Stand-point the true one.—Inviolability of Neutral Territory and Territorial Waters.—Rules restrictive of Conduct of Belligerents within such localities.—Regulations as to admission of Privateers and Prizes, and as to supplies of Coal.—Grant of Asylum.—Unlawful to levy forces in Neutral Territory, or to march Troops across it.—Difference between State-Acts of Neutrals, and private Acts.—Contraband.—Blockade.—Enemy-goods in Neutral Ships: Neutral Goods in Enemy-ships.—Declaration of 1856.—Visitation and Search.—Recognition of Belligerent Rights.—Recognition of Independence.

Law as to Neutrals chiefly modern.

531. The greater part of this important branch of International Law has been developed during

recent times; indeed the very phraseology of it is quite modern. As Mr. Wheaton has remarked, there are no words in Greek or Latin that answer precisely to our terms "neuter" and "neutrality"*. Even in the time of Grotius this poverty of the language of jurisprudence continued. This furnishes a proof of how little the rights and duties of third parties were then considered by Statesmen and Publicists. Grotius almost apologizes for devoting any part of his book to those "qui extra bellum sunt positi, quando in hos satis constet nullum esse jus bellicum"†. Those whom we call "Neutrals" receive from him the cumbrous and vague title of "hi, qui in bello medii sunt." The chapter which he gives to them is "short and meagre, with no allusions to the subject of maritime neutral law"‡. A century afterwards Bynkershoek wrote more fully and judiciously in his 'Quæstiones Juris Publici' respecting those whom he sometimes calls "non hostes," and sometimes "medii" in a war§. Vattel

The subject slighted by Grotius.

How treated by Bynkershoek.

* Elements, tom. 2. p. 72.

† De Jure Belli ac Pacis, lib. iii. chap. ix.

‡ 3 Phillimore, p. 201.

§ "'Non Hostes' appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent: si quid debeant, fœderati sunt, non simpliciter amici. * * Horum officium est omni modo cavere ne se bello interponant, et his quam illis partibus sint vel æquiores vel iniquiores. 'Bello se non interponant'—hoc est in causâ belli alterum alteri ne proferant; et eo soli rectè defunguntur, qui neutrarum partium sunt. Si rectè judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum; ejus non est inter utrumque amicum sibi invicem hostem sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus nimisve tribuere vel negare. * * * Si medius sim, alteri non possum prodesse ut alteri noceam."

Improvement by Vattel's treatment.

gives the seventh chapter of his third book to the consideration "De la Neutralité, et des troupes en pays neutre." By him, and since his time, the simple and expressive terms of "Neuters" and "Neutrality" have been brought into general use. And he supplies a good definition when he says that, "Les peuples neutres, dans une guerre, sont ceux qui n'y prennent aucune part, demeurant amis communs des deux partis, et ne favorisant point les armes de l'un au préjudice de l'autre"*. Vattel did much in this, as in other departments of International Law, to improve public opinion and political practice; and the importance of ascertaining and of respecting the true position of Neutrals with regard to Belligerents became more and more generally recognized during the last half of the 18th century.

Introduction of the terms "Neuters" and "Neutrality."

Great service done to International justice as to Neutrals by Washington and Jefferson.

532. The great Statesmen who wisely and firmly guided the policy of the United States during the first twenty years after the recognition of their Federal Republic as an Independent Power—a period of almost unprecedented conflict and excitement among the principal communities of the civilized world—deserve the credit of having done most to ascertain and to establish the sound principles on which Neutrals should act towards Belligerents†. When war

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Bynk. Quæst. Jur. Pub. lib. 1, ch. ix. See Wheaton, Elements, tom. ii. p. 73; Travers Twiss, 'Law of Nations,' vol. ii. p. 428; and Hall, 'Rights and Duties of Neutrals,' p. 35.

* Livre iii. ch. vii. pars 103–110.

† See Hall, 'Rights and Duties of Neutrals,' p. 44; 3 Phillimore, p. 217.

broke out between England and Revolutionary France in 1793, attempts were made by the French agents to use the American ports for fitting out cruisers against English commerce. On complaint of this being made by the British Minister to General Washington, the President of the United States, a formal declaration was issued by Mr. Jefferson, the Foreign Secretary of the States, which declared that "It is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits." So far Mr. Jefferson was only following older authorities. But the American Statesman went further, and pronounced that "it is *the duty* of a neutral nation to prohibit such as would injure one of the warring powers"*.

Previous vagueness in doctrine, and incoherency in practice of Jurists and Statesmen of the Old World.

This important principle was first clearly stated thus, and was consistently acted on by the new Republic of the Western World, after the Jurists of the Old World had long written confusedly and doubtingly, and after the Statesmen of the Old World had long been "incoherent" in their practice with regard to it. In the same year (1793) Mr. Jefferson, in a State-paper transmitted by him to the American Minister in Paris, laid down the same rules still more fully. According to that document, "A neutral nation must in all things relating to the war observe an exact impartiality towards the two parties. No succour should be given to either, unless stipulated by treaty†, in

Jefferson's more detailed despatch on the subject.

* Cited by Mr. Hall, p. 44.

† As to the force of treaty-stipulations which purport to bind one State to interfere in the affairs of others, see *infrâ*, on "Qualified Neutrality."

men, arms, or any thing else directly serving for the war. The right of raising troops being one of the rights of sovereignty and, consequently, appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent. If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments"*.

Liability of State for Acts of its subjects.

533. These principles will be found extremely valuable in dealing with one very large class of cases, in which disputes often arise between belligerents and neutrals. Such cases involve a subject which has already been discussed to some extent in the eighth chapter of the present work—namely, how far a State is responsible for wrongful acts committed without her orders by members of her community against other States†.

Another important branch of Neutrality Law is the International Law as to Contraband and Blockade. Before we proceed to these and certain other necessary topics, it is desirable to revert to the meaning of the terms Neutral and Neutrality. We will consider the character of Conventional Neutrality as distinguished from Natural Neutrality; and we will examine whether what are called "Qualified Neutrality"

Further consideration of term "Neutrality."

* Cited in Hall, p. 45; and see Wheaton, Elements, tom. ii. p. 84.

† See *suprà*, p. 157 *et seq.*, and especially the passage there cited from Sir Alexander Cockburn's judgment in the Geneva Arbitration.

and "Friendly Neutrality" are ever to be admitted as lawful.

534. The ordinary and normal condition of neutrality is the condition in which States find themselves which are no parties to a war between two more belligerents. This condition of natural neutrality exists by virtue of the general principles of International Law, and not by virtue of any special compact. This is the kind of neutrality which is intended through this chapter wherever the term is used generally and without any limited or special meaning being assigned to it by the context.

Natural or Normal Neutrality.

535. Conventional Neutrality exists by virtue of treaties, to which the conventionally neutral State and the belligerent States are parties. It sometimes happens that the geographical position of a State between parts of the territories of other States makes it a matter of advantage to those other States that in the event of war breaking out between them, the intermediate territory of the State in question should not be made the scene of hostile marches or operations, but should act as a screen and as a protection to those portions of the frontiers of its neighbours to which it is conterminous. Such an agreement is almost certain to be to the advantage of the State the soil of which is thus made privileged ground. It has been thought that the best way to secure this was by making the State in question expressly and permanently neutral. We accordingly read of treaties by which the neighbouring States, some or all of them, bind themselves to respect and maintain the

Conventional Neutrality.

neutrality of a particular State, which, in return, binds itself to take no part in their wars with each other. The histories of Switzerland and of Belgium will give instances of European States thus neutralized.

Instances of Switzerland and Belgium.

It may also sometimes be thought that the general interests of the commonwealth of civilized States will be promoted by the complete or partial neutralization of a particular State; and accordingly we find Powers becoming parties to treaties of this kind, whose territories are more or less remote.

Political condition of a Conventionally Neutralized State.

536. A State whose neutrality is thus protected by treaty, undergoes some limitations of its liberty of political action. It must enter into no engagements which might in any way interfere with its perfect impartiality in the event of war breaking out, or with its total abstinence from cooperation with either party. It cannot combine the characters of prospective neutral and prospective ally*.

Qualified Neutrality unreal.

537. It sometimes happens (and it used formerly to be much more often the case) that a State binds itself to assist another State in its wars by granting rights of passage to armies, or special privileges to fleets and cruisers, or by supplying defined amounts of auxiliary troops or of ships of war. If the State with which such covenants had been made, went to war with any third State, the position of the covenanting State towards such third State used to be termed a Condition of Qualified or Imperfect Neutrality.

Nature of the so-called Qualified Neutrality.

* For a further account of the jural position of conventionally neutral States, see Wheaton's Elements, tome ii. chap. iii. sect. 4.

Frequent discussions will be found in the older Publicists whether the Covenanting State assumed any, and, if so, what amount of hostile character towards the third State, so long as the Covenanting State kept strictly within the limits of its treaty-obligations as to the amount of succour which it supplied. But it is obvious that a State, which sends its soldiers and fleets to take part in a war, becomes one of the belligerents; and covenants of this kind ought to be regarded as covenants of Alliance. The aid to be rendered or the favour to be shown may be so slight that it may be overlooked by the Belligerent whom it more or less injures*. Even if the aid be considerable, the circumstances of the case may make it politic for the injured Belligerent to renounce his right of treating the intruder into the quarrel as an avowed enemy. But he certainly has the right to do so; and, if the aid-supplying State disclaims the character of Ally, it may render itself liable to be regarded as an unlawful meddler in the affairs of other States, and as guilty of that kind of Intervention which authorizes the counteracting Intervention of other Powers†.

The real condition is that of Alliance.

The injured Belligerent may overlook such hostility.

But he has a right to treat the Auxiliary Power as his enemy.

Further liability of such an Auxiliary.

* "It is manifest that agreements like these partake of the nature of Alliance. The other Belligerent then is free to decide whether he will regard such a State as neutral or as an ally of his enemy. If the assistance to be rendered is trifling, and has no reference to a particular case or a war with a particular nation, it will probably be overlooked; otherwise, it will expose the nation furnishing the assistance to the hostility of the other."—Woolsey, p. 262, and see 3 Phillimore, p. 221.

† See page 295, *supra*, on the "Lawfulness of armed Intervention to repress the Intervention of others."

Attempts to establish a "Benevolent Neutrality."

538. An attempt has sometimes been made by one of two Belligerents to induce a third State to treat it with what is termed "a Benevolent Neutrality;" that is to say, the third State is desired to give it all possible aid, and to obstruct its adversary as much as possible, while keeping within the letter of International Law as to what acts are strictly permissible or not to Neutrals. Our English Statesmen on a recent occasion properly refused to acknowledge the rightful existence of any Neutrality of the kind*. Neutrality means impartiality, or it means worse than nothing. If a State is convinced that the cause of one of two Belligerents is thoroughly just, and that the cause of the other is so flagrantly unjust as to make opposition to this last-mentioned Belligerent a duty towards the general commonwealth of States, let the State, which thinks so, act, if it thinks fit, openly and honestly up to its opinions by becoming the Ally of the party which it believes to be in the right. But it is mere hypocrisy to call itself a Neutral and to be in reality a partisan. Moreover the State, which tries thus to influence the fortunes of a war without exposing itself to the responsibilities of warfare, commonly fails in attaining its object. Sooner or later it usually is made a party to the conflict which it promotes; and it has the unpleasant consciousness of finding that "it has sneaked into a war"†.

Rightly repudiated by English Statesmen.

Canning's advice "Not to sneak into a war."

* See the diplomatic correspondence between Count Bernstorff and Lord Granville during the war between Germany and France in 1870.

† See Canning's Speeches, vol. v. pp. 51, 52, cited in 3 Phillimore, International Law, p. 216.

539. It follows that the only kind of special or exceptional Neutrality, that is to be recognized in Jurisprudence, is the "Conventional Neutrality" already explained. This requires no further notice; and in the remainder of this chapter the Neutrality of which we discuss the incidents means common, natural, normal Neutrality.

540. We may take a general brief definition of it from Sir Alexander Cockburn's Geneva judgment:—

Definition of natural Neutrality.

"Neutrality may be said to be the *status* of a country relatively to two others which are at war with one another, while it remains at peace with both and gives assistance to neither."

Need of determining standpoint whence we are to regard Neutral rights and duties.

541. In ascertaining the rights and duties of a Neutral according to this definition, it is important to make up our minds from which of two standpoints we are to consider the subject. There is the Belligerent-interest standpoint, and there is the Neutral-interest standpoint.

Views of the Belligerent.

The Belligerent, when he looks to any act or any refusal to act by a third State, is apt to regard it solely with reference to the question, "Is the third State hurting my chances of success in the war?" If (for example) his enemy gets supplies of arms or ammunition from the third State, or if his enemy's ships at critical periods get shelter (however brief) in the enemy's ports, the Belligerent is apt to think himself injured, and to complain vehemently of the Neutral from whom his enemy receives benefits.

Views of the Neutral.

On the other hand, the Neutral State says, "I was at peace with both of you, and I wish to remain so. I had nothing to do with your quarrel, and I both

intend and pledge myself to have nothing to do with it. Only be good enough to abstain from interfering with me and mine, and to let my subjects pursue their ordinary callings of manufacturing, of buying and selling, of carrying and trafficking as usual, subject to the well-known exceptional rules about Contraband, and Blockade, and Search; and, as to these, be very strict in keeping within the limits which International Law imposes on your extremely inconvenient prerogatives. With respect to my ports and havens, I am not going to deny to any vessel the shelter which the feelings of humanity as well as of hospitality enjoin; but I will make such regulations, and I will enforce them with such impartial strictness on both you and your adversary, that you shall not be able to make my territory or my territorial waters your scenes of battle or plunder; nor shall you use them as lairs whence you may pounce upon your prey."

The Neutral standpoint the true one.

542. Certainly the claims of the Neutral to be recognized as "master of the situation" are better-founded than those of the Belligerent; and they are entitled to preference on all sound principles of Utilitarianism. During almost all wars, and certainly at the inception of all wars, the great majority of civilized States are neutral; and it is for the interest of mankind that Neutrality should be as extensive, and Belligerency as limited as possible. The cases where the common good of nations requires a general armed combination to restrain and quell an enormous offender* are so rare, and such duty is so seldom heeded,

It is for the benefit of the greatest possible number; and it is for the general good of mankind.

* See *suprà* p. 44, as to the Solonian maxim.

that such cases may be regarded as exceptional. If Belligerents are to be allowed to construe and define the rights and duties of Neutrals according to their own (the Belligerents') convenience, the consequence must be that Neutrals will be continually liable to be "drawn within the vortex of wars with which they have no concern"*. In the judicial enunciation of principles of decision which was given at the Geneva Arbitration by M. Staempfli, the Arbitrator appointed by the President of the Swiss Confederation, it is well said, that "We must beware of rendering the condition of Neutrals too difficult and almost impossible. The importance of circumscribing war is a matter of continual remark; and if Neutrals are to be overwhelmed with a burden of precautions and a weight of responsibility which is in excess of the interest they have to remain neutral, they will be forced to take an active part in the war; instead of a proper inaction, we should have an increase of hostilities. There will no longer be any *medii* between combatants; the disasters of war will be multiplied; and the part of mediators, which Neutrals have often undertaken and brought to a successful conclusion, will for ever disappear"†.

Mischief of making the convenience of Belligerents the standard of right.

Remarks on this subject of M. Staempfli.

543. I now proceed to consider a little in detail the rights and duties of Neutrals, the general condi-

General obligations of Neutrals.

* See Sir A. Cockburn's judgment, Blue Book, North America, no. 2 (1873), p. 63.

† Blue Book, North America, no. 1, 1873, pp. 185, 189. See also as to the primary importance of the interests of Neutrals, Heffter, Droit International, p. 274, sect. 144; Bluntschli, p. 46; Woolsey, p. 261; Abdy's Kent, p. 322.

tions of Neutrality (as laid down by Dr. Gessner, and as adopted by M. Staempfli in the judicial State-paper already referred to) being :—

"1. To take absolutely no part in the war, and to abstain from all that might give an advantage to one of the belligerent parties.

"2. Not to permit on the neutral territory any immediate hostility of one party against the other"*.

How far their rights and duties originate from a state of warfare.

544. Some of the rights of the Neutral State, of which I am about to speak, cannot be quite accurately termed rights arising from a condition of warfare between other nations, inasmuch as they are rights of Sovereignty and of exclusive Self-Government, and are the essential and constant attributes of all political communities which are recognized as States in International Jurisprudence. But they are brought into prominent notice and into practical importance by the outbreak of a war between others; and the great majority of matters which we must discuss in this chapter originate in belligerency from which the State abstains as a party, but by which it is unavoidably affected to a greater or less degree, according to geographical position, commercial habits, and numerous other circumstances.

Inviolability of Neutral Territory.

545. One of the plainest rights of a Neutral State is the inviolability of its territory. The Belligerents must not break its peace by making it their battle-ground. A similar privilege is extended to the territorial waters of a Neutral—that is to say, not only to the ports, havens, gulfs, bays, and narrow seas which

Privileges of Territorial Waters.

* Blue Book, North America, no. 1, 1873, pp. 189, 195.

are held to be parts of its territory, but also to the seas which wash its coasts to a distance from the shore, which has hitherto been computed at a maritime league, but is likely henceforth to be reckoned at five miles*. "The armed cruisers of belligerents, while within the jurisdiction of a Neutral State, are bound to abstain from any acts of hostility towards the subjects, vessels, or other property of their enemies; they cannot increase their guns or military stores, or augment their crews, not even by the enrolment of their own countrymen; they can employ neither force nor stratagem to recover prizes or to rescue prisoners in the possession of the enemy; nor can they use a neutral port, or waters within neutral jurisdiction, either for the purpose of hindering the approach of vessels of any nation whatever, or for the purpose of attacking those which depart from the ports or shores of Neutral Powers. No proximate acts of war, such as a ship stationing herself within the neutral line, and sending out her boats on hostile enterprises, can in any manner be allowed to originate in neutral territory; nor can any measure be taken there which will lead to immediate violence"†.

General Halleck cited.

546. The following additional rules as to the restrictions to be imposed by Neutrals on Belligerent ships of war and privateers are taken from a list drawn up by the Italian Jurist Azuni, and cited by Sir Travers Twiss:—

"They [*i. e.* privateers and all vessels of war] may not keep sentinel in the port, nor seek to procure

Other restrictive rules as to Belligerents, cited from Azuni.

* See *suprà*, p. 232 *et seq.* † Halleck, p. 523.

information about the vessels which are likely to touch there. In case that they descry any of them, they are not to sail out of the port for the purpose of attacking them. If they should do so, they may be fired at from the batteries and ships of war in port, and compelled to return.

"They may not set sail after an enemy's ship has tripped her anchor; they ought to allow at least an interval of 24 hours to elapse between its departure and their own. After this interval has elapsed, if the enemy's ship is still in sight of the port, a belligerent vessel ought to delay its departure until the other vessel is out of sight and the direction of its course cannot be known"*.

Rules issued by the United States in 1855.

547. Clear and valuable declarations of International Law and Practice in some important matters of this kind are to be found in a manifesto issued by the United States in 1855, on occasion of the war between Russia on the one part, and Great Britain, France, Turkey, and Sardinia on the other part.

"1st. Belligerent ships of war, privateers, and the prizes of either are entitled, on the score of humanity, to temporary refuge in Neutral waters from casualties of the sea or war.

"2nd. By the Law of Nations, Belligerent ships of war, with their prizes, enjoy asylum in Neutral ports for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the Neutral Sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place, and

* See Sir Travers Twiss, p. 449.

other circumstances as he shall think fit, provided that he be strictly impartial in this respect towards all the Belligerent Powers.

"3rd. When the Neutral State has not signified its determination to refuse the privilege of asylum to Belligerent ships of war, privateers, or their prizes, either Belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations and limitations as the Neutral State may please to prescribe for its own security" *.

Refusals to admit Privateers or Prizes.

548. Neutral States, in the exercise of that discretionary power which, as we have seen, they possess as to admitting Belligerent vessels, have not uncommonly in recent wars forbidden the privateers of both parties to enter their ports, and have also forbidden both parties to bring thither their prizes of war. Since war-steamers have become so generally used in naval operations, it has become a question whether supplies of coal to a steam-warship, while in a Neutral harbour, are to be regarded as supplies of propelling and directive power for purposes of battle, so that they ought to be refused as supplies of ammunition are refused, or whether they are to be regarded as necessary instruments of locomotion, like the canvas of a sailing vessel. The regulations issued by the British Government during the war between the Northern and Southern States of America, and during the war between Germany and France, directed that ships of war or privateers of either Belligerent should be furnished with only so much coal as might be sufficient

Regulations as to supply of coal.

* See Sir Travers Twiss, p. 453.

to carry them to the nearest port of their country or some nearer destination, and that no coal should be again supplied to any such ship of war or privateer in the same or any other part under British jurisdiction, without special permission, until after the expiration of three months from the time of the previous supply."

Mere passage through territorial waters.

549. The mere passage of a Belligerent ship over territorial waters, without the exercise of any violence during such passage, is not usually regarded as a breach of the Neutral's territorial inviolability*.

The grant of Asylum.

550. In discharge of the duties of humanity a Neutral State may allow a defeated or an enfeebled and imperilled land-force to take shelter in its territory; and we have seen that it may give shelter in its ports and territorial waters to a ship in distress, whether the distress be caused by perils of the sea or perils from an enemy. But, as General Halleck observes,

Different rules observed as to ships and as to troops.

"Publicists make a marked distinction between the duties of Neutrals, with respect to the asylum which may be afforded to belligerent ships and that which may be afforded to belligerent forces on land. * * * It is the duty of the Neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners and to restore all booty that they may bring with them. If he (the Neutral) neglects to do this, he makes his own territory the theatre of war, and justifies the other Belligerent in attacking such refugees within such territory, which is no longer to be regarded as neutral"†.

* Abdy's Kent, p. 328. † Halleck, p. 524.

551. A Neutral State, besides its right to require from Belligerents that they shall not carry on operations of violence of any kind within its territory or territorial waters, has also the right to require from them that they shall not attempt the exercise within its dominions of any acts of Sovereignty whatever. This topic has been already referred to, when attention was drawn at the commencement of this chapter to the American State-papers, which were issued at the commencement of the war between Great Britain and Revolutionary France. There are some other acts, besides those especially then noticed and prohibited by the United-States Government, which nations at war with each other used often to practise in neutral countries according to the lax habits, which prevailed in Europe as to such matters during mediæval times, and during modern times also prior to the period of which we have last been speaking. The chief acts of the kind, which require any comment, appear to be the levying and organizing of troops, or of forces of any kind, naval or military, for the purposes of the war, and the marching across any part of the neutral territory of troops intended to take part in hostilities.

Privilege and duty of a Neutral to forbid exercise by others within its territory of Sovereign rights, such as levying or marching troops, fitting out expeditions, &c.

552. Long after it was generally admitted by Publicists and Statesmen that a Neutral State has the right to refuse to allow a Belligerent the liberty of raising troops in the neutral territory, or of fitting out naval expeditions in the neutral ports, or of marching a body of soldiery across any part of the Neutral's dominions, it was considered that the Neutral might at its discretion lawfully grant such liberties, especially if it

Long-prevalent idea that the allowance by the Neutral of such acts was discretionary.

The sound principle is, that it is the duty as well as the right of the Neutral to prevent such acts.

was ready to grant the same to the other Belligerent power upon application*. But sound sense and the general interest of the commonwealth of nations alike require the assertion and the steady maintenance of the rule laid down by the United States, that a Sovereign State not only has the lawful power to prohibit all strangers from exercising acts of sovereignty within its dominions, but that it is also its duty to enforce such prohibition, when a war has broken out, in respect of which it intends to preserve a condition of neutrality. The arguments by which Vattel demonstrates that a Neutral State cannot justify itself for succouring one Belligerent by professing its willingness to grant equal succour to the adversary†, are conclusive as to this matter also. It is impossible to give help of this kind with true impartiality, and with equal benefit to both sides. This truth has been most fully recognized of late years with regard to the levying of troops and fitting out expeditions. President Woolsey‡ has well said that "It is impartiality in form only when I give to two parties rights within my territories, which may be important for the one and useless to the other. The United States, in a war between Great Britain and Russia, might allow both parties to enlist troops within their borders; but what would such a privilege be worth to Russia? And indeed almost every privilege conceded by Neutrals would be apt to inure more to the benefit of one than of the other of two hostile nations." Moreover, as

* Martens, pp. 312, 313. † Livre iii. ch. vii. sect. 105.
‡ P. 265.

Vattel has observed, it is not the maintenance of equality in the amount of troops, or munitions of war, which each belligerent obtains, that can constitute real equality. The circumstances under which the supplies respectively are obtained must inevitably differ; and the difference of circumstances gives one supply a greater or less effect than the other supply can produce on the fortunes of the war. With respect to the transit of troops, Publicists have been more tolerant than with regard to the levy of forces; and some think that the Neutral may allow such transit, if he grants the same right to both sides*. But the principles, according to which the levy is forbidden, apply to the march also. It is certainly an act of intrusive sovereignty when a body of armed men traverses a country, such body being under the military-law discipline and control of its own officers, who represent a sovereign foreign to the country. The excuse of an impartial readiness to allow rights of passage to the troops of the adversary, when required, is here also an utter delusion. That adversary may never require such a passage; and the grant of it to the really favoured Belligerent may enable him to execute an operation so important, or to mass such a predominant force on a critical point at the right moment, as virtually to decide the war†.

Equality of amounts of supply does not constitute real equality of aids conferred.

Transit of troops ought never to be allowed.

* Wheaton's Eléments, tome 2. p. 86; Travers Twiss, p. 443, and others.

† Heffter (page 280, sect. 147) says well that "De pareilles concessions ne peuvent se concilier avec les lois d'une stricte neutralité. Car il est difficile d'empêcher qu'elles n'exercent quelque influence sur le sort de la guerre. Presque toujours elles augmenteront

Difference between State-acts of Neutrals and acts of individuals.

553. In the great majority of cases in which a Belligerent complains against a Neutral, the act, which is the root of the subject-matter of complaint, is not any regular authorized act of the Neutral Government itself, but is the act of some individual or individuals subject to that Government, for whom the Belligerent claims to hold the Neutral State, as a State, responsible. We have already, while examining the "Perfect Rights of States," considered somewhat fully the principle which binds a State to prevent its subjects from injuring other States*. I refer my readers to that part of this treatise for the reasoning of Vattel and Halleck on the subject; but I will again quote here part of Sir A. Cockburn's Geneva judgment, which deals with it, on account of its lucid completeness, and also because when taken in the very words of the Lord Chief Justice of England, it bears exactly on the theme of this present chapter, the position of a Neutral relatively to Belligerents. Sir A. Cockburn says:—

Part of Sir A. Cockburn's Geneva judgment again cited.

"Whatever obligations attach by the general principles of the Law of Nations to the State or Community as a whole, are equally binding on its subjects or citizens; for the State or Community is but the aggregate of its

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les forces de l'un des belligérants, lui donneront des chances de succès, et, par conséquent, nuiront dans la même proportion à l'autre. Presque toujours la situation du territoire neutre se prête plus facilement aux opérations de guerre de l'une que de l'autre partie. Leur en accorder simultanément le passage, c'est en réalité ouvrir le territoire neutre à des hostilités ou favoriser une partie contre l'autre."

See also Woolsey, p. 269. sect. 160.

* See *suprà*, chap. viii. p. 147.

individual members, and whatever is forbidden to the entire body by that law is equally forbidden to its component parts. In this sense, and in this sense only, can it be said that International Law—in other words, the common law of nations—forms part of the common law of England; for the greater part of the rules of International Law, by which nations now consent to be bound, are posterior in date by many centuries to the formation of the common law of England. Nevertheless, as Great Britain forms part of the great fraternity of nations, the English common law adopts the fundamental principles of International Law, and the obligations and duties they impose; so that it becomes, by force of the municipal law, the duty of every man, so far as in him lies, to observe them, by reason of which any act done in contravention of such obligations becomes an offence against the law of his own country.

How an offence against International Law becomes an offence also against the municipal law of the offender's State.

"But the subject who infringes the law of his own country by violating the neutrality which the law enjoins him to maintain, is amenable for his offence to the law of his own country alone, except when actually taking part in the war as a combatant, when of course he is liable to be dealt with according to the laws of war. The offended belligerent has otherwise no hold on him. International Law knows of no relations between a State and the subjects of another State, but only of those which exist between State and State. But this being so, the belligerent against whom a breach of neutrality has been committed by the subject of a neutral State, as distinguished from the State

Extent of this liability individually.

itself, may have a right to hold the State responsible, and to look to it for redress. For the State (that is, the Community as a whole) is bound to restrain its individual members from violating obligations which, as a whole, it is bound to fulfil. Not, however, that the responsibility of the State for the acts of its subjects is absolute and unlimited. Reason has set bounds to a responsibility which would otherwise be intolerable. For it must be remembered that the consequence of a violation of neutrality is the right of the offended belligerent to treat the offending neutral as an enemy, and declare war against him. He is not bound to accept pecuniary amends as an alternative. Now reason points out that the Government of a country can only be held responsible for breaches of neutrality committed by its subjects when it can reasonably be expected to prevent them. There are things which a Government *can* prevent, and others which it cannot. It can prevent things that are done openly, and in defiance of the law. The open levying of men, and expeditions departing from its territory by land or water, are things which a Government would properly be expected to prevent, and for which, if not prevented, it would be answerable. But a Government could not be so held in respect of things it cannot prevent, such as the conduct of individual subjects in enlisting or serving in the land or sea force of a belligerent*;

Extent of State's Responsibility.

* Some observations will be found a little further on as to the liability of a Neutral State if its subjects take service with one belligerent in large numbers, and especially if the belligerent is thus supplied with officers and generals.

or things done clandestinely or surreptitiously, so as to elude observation or detection, notwithstanding the exercise of proper diligence to prevent the law from from being broken. But then the exercise of such diligence is part of the duty of a Government, and the condition of its immunity. If this diligence has been wanting, a belligerent has just cause to hold the neutral State responsible for wrongful acts done by its subjects in violation of neutrality, and from which it, the belligerent, has suffered."

554. In complaints by Belligerents against neutral States for the acts of individual neutral subjects, there is frequently a grave matter for consideration, which must be dealt with prior to the investigation of the point whether the neutral State has or has not used due diligence as to preventing breaches of International Law by its subjects. We have seen that Neutrals claim (and as a general principle justly claim) for their subjects liberty to pursue their usual callings, professions, and trades, as producers, as manufacturers, as buyers and sellers, without being molested or hindered in them because two foreign States have thought fit to go to war with each other. Many trades and occupations are concerned with the production and fitting up of things serviceable in warfare; such, for example, are the trades of the gunmakers of Birmingham and Liége, of the sword-cutlers of Sheffield, and of the shipwrights of Greenock and Amsterdam. If a dealer of this kind receives an order for a supply of goods, such as he is in the habit of supplying to any customer who asks for them, he considers it a

Prior question often arises whether the neutral subject has done more than pursue his customary business.

grievance, if he is debarred from executing the order by the circumstance that the intending purchaser may and probably will use the articles in warfare.

Soundness of general principle of Liberty of Commerce within neutral countries.

555. The principle of "The Liberty of Commerce within the territory of Neutral Powers" may be regarded as a true and sound one*; but it unhappily comes sometimes into collision, real or apparent, with another equally sound and certain principle, namely with the duty of Neutrals to abstain from helping either of the parties to the war.

It sometimes clashes with the duty of Neutrals not to help Belligerents.

The *animus* of the supplier is to be regarded. Was it *animus commerciandi*, or *animus adjuvandi*?

556. The test which reason points out for the solution of such difficulties is the distinctive test indicated in part of Sir A. Cockburn's judgment, when, after discussing cases in which Neutrals have clearly been acting with the design of helping one party in the war *animo adjuvandi* for the direct purpose of enabling him to overcome or resist his opponent, he proceeds to observe that "very different considerations present themselves when we have to deal with assistance furnished to a belligerent, not *animo adjuvandi*, with the object of enabling him to overcome his enemy, but *animo commerciandi*—in the way of trade and commerce."

Such questions seldom arise when the neutral State deals as a State.

557. The question of the applicability and of the effect of this test can very rarely arise when it is the Neutral State itself, acting as a State, which gives the assistance. A State (as Sir Alexander Cockburn re-

* See the authorities on this subject brought together and their effect considered in Sir Alexander Cockburn's Geneva Judgment, Blue Book, pp. 11-26. See also Sir Travers Twiss, p. 432 *et seq.*

marks) "cannot, consistently with neutrality, under any circumstances, supply to one of two belligerents articles which may be of use to him in carrying on war. For, as Governments do not engage in trade, save in exceptional cases of very rare occurrence—as, for instance, when a Government disposes of ships for which it has no use—nothing supplied by a Government to a belligerent can be supplied otherwise than *animo adjuvandi*—that is, for a purpose inconsistent with neutrality. But its subjects stand, in this respect, on a very different footing. The subject, indifferent to both the belligerent parties, may be willing to sell to either articles of warlike use in which he is in the habit of dealing"*.

558. If the transaction in question is *bonâ fide* carried on by the neutral subject *animo commerciandi*, the preponderance of authorities and the preponderance of utilitarian arguments decide (as we have seen) that the transaction is internationally lawful. In many kinds of such transactions the circumstances of the case, and the nature of the article supplied will give the means of ascertaining with reasonable certainty the *animus* which was the motive of the neutral maker, seller, or contractor. It is for the party who imputes illegality to prove it. Where the matter is left doubtful the general maxim should apply, and the *benignior interpretatio* should be followed†.

The test is easily applied with regard to many articles of supply.

559. There is, however, a special kind of articles of

Difficulty in applying the test with regard to ships suitable for war.

* Blue Book, North America, no. 2 (1873), p. 11.

† "In re dubiâ benigniorem interpretationem sequi non minus justius est quàm tutius" (50 Dig. xvii. 192).

great demand both in time of peace and in time of war, but particularly so during war-time, which are of such a nature and of such applicabilities as almost always to create suspicion that they are supplied *animo adjuvandi*, though an *animus commerciandi* may exist concurrently. The articles of which I speak are ships so constructed, so fitted up, and so furnished as to be promptly available for hostile operations. It is said on behalf of the neutral ship-builder that it is his regular business to supply all customers with ships of various kinds, according to each customer's requirements. It is said on the other side, that the sending out a war-ship equipped for action is in itself the sending out a war-expedition; and it is added (as appears to me with truth and reason) that the warlike character of such an act cannot be avoided or got rid of by any scheme or artifice as to sending the ship out of the neutral waters without her guns, or stores of ammunition, or without her fighting crew, but in pursuance of an arrangement by which her guns and ammunition and fighting crew are to be got ready for her, and placed on board of her when she has passed out of the neutral State's territorial jurisdiction. If there does exist an International Law forbidding Neutrals to aid a Belligerent by fitting out and sending forth a war-ship to fight, to blockade, and to plunder for him, the general principle of jurisprudence must apply, the principle that what a Law forbids to be done directly it also forbids to be done indirectly.

To send out a war-ship equipped for action is to send out an expedition.

Belligerent character of such an act not to be evaded by artifice.

560. War-ships, which are thus obtained by one of two Belligerents from a Neutral, are almost always

chiefly employed in the capture and destruction of the other Belligerent's merchant-vessels; and their operations invariably create in the party which suffers from them a vehement feeling of indignation against the country whence such depredating cruisers are supplied. In order probably to check the growth of such animosity and the probable outbreak of fresh wars, as well as on principles of general expediency and justice, many civilized nations have now introduced into their systems of municipal law enactments specifically forbidding certain acts on the part of builders and armers of vessels and others, and conferring certain powers on the local executive authorities, so as to prevent more surely their subjects from taking part in proceedings which it is natural to regard as hostile expeditions. I do not feel that it is my duty to discuss the provisions of any of these enactments; I would merely remark that the last statute passed in this country on the subject (33 & 34 Vict. c. 90) is so comprehensive and clear, and places such ample means of prevention as well as of punishment in the hands of the Government, that it can hardly be possible for difficulties and differences again to arise, like those which created the notorious Alabama claims. But our business is with general International Law; and, independently of all municipal legislation, we may with confidence aver that International Law is broken when a member of a neutral political community supplies, or cooperates in supplying, a Belligerent with a hostile force, either military or naval, *animo adjuvandi*. The *animus* must generally be proved by the circumstances;

Bitter animosity of the suffering Belligerent against the neutral country whence such expeditions issue.

Municipal Laws to prevent such practices.

and every person (whether a State or an individual) may properly be taken to intend the natural consequences of his own conduct. The topic of to whom a State is responsible as a State for such misdeeds of its subjects will be further discussed presently.

As to advances of money by gift or by loan.

561. There is another mode in which help is sometimes received by one of the Belligerents from a neutral country; I mean in the form of supplies of money. This may be done by voluntary donation or by loan. If a neutral State were by a State-act to supply one of the parties to a war with "the sinews of war," either by way of gift or of loan, such conduct would so clearly be stamped with the *animus adjuvandi* as to entitle the other Belligerent to treat it as an unlawful interference in the war. But such conduct on the part of States rarely, if ever, occurs in modern practice. We hear of loans raised in foreign countries by warring States; but they are obtained from private individuals or companies; and when the advance of money is an open gift, such liberality is exercised by sympathizing individuals, who take deep interest in the success of one party to the hostile struggle, and who, besides holding meetings and making speeches, offer and organize subscriptions of money in aid of the side which they wish to prevail over its adversaries. It is during wars of insurrection that active sympathy is usually thus rendered by foreigners.

This generally done by individual sympathizers or speculators.

Difference of opinion as to legality of loans by private persons.

562. With respect to the legality of individuals in a neutral country supplying money by way of loan to a belligerent State, there is a difference of opinion

among modern Jurists. Some hold that such assistance is in all cases and under all circumstances internationally unlawful; others consider it permissible, if the persons who advance the money are doing so in the course of commercial practice, and the transaction is a mere Stock-Exchange speculation as to profit or loss by dealing in money*. This last appears to be the most sensible opinion.

Illegality of money-supply if *animo adjuvandi*.

563. It is a widely different matter if the money is supplied either openly or really, though under pretext of loan, for the purpose of fomenting or encouraging civil war in a friendly State, or of helping one of two Belligerents against its adversary. The *animus adjuvandi* here makes the proceeding a breach of International Law; and such conduct ought also to be regarded as an offence against the neutral State within whose municipal jurisdiction it is perpetrated†.

* See 3 Phillimore, p. 221; Woolsey, p. 270; Halleck, p. 526; Hall, p. 49; Bluntschli, p. 427. Such judgments of Law Courts as that (often referred to) of the English Court of Common Pleas in De Wutz *v.* Hendricks, ix. Moore, p. 586, do not apply to this point. Lord Wynford, C. J., in that case, pronounced that it was illegal to lend money for the express purpose of enabling subjects of a foreign friendly Government to carry on war against it. The distinction is obvious.

† In the second volume of the last series of the Wellington Despatches, p. 100, will be found copies of opinions given by the Law Officers of the Crown in 1823, as to whether subscriptions or loans for the use of one of two belligerent States by individuals, subjects of a nation professing to maintain a strict neutrality, are contrary to the law of nations, constituting such an offence as the other Belligerent would have a right to consider as an act of hostility on the part of the neutral Government. The Crown-advisers were also con-

As to individuals taking service in Belligerents' fleets or armies.

564. Another mode in which individual subjects of a neutral State frequently take part in a war without the order or sanction of their own Government, is the most direct of all modes, the taking service in one

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sulted as to whether persons or corporations engaged in such subscriptions could be prosecuted by the municipal law of England.

The answers of the Law Officers are not in all respects clear; but some valuable light may be gained from them. They hold that such subscriptions are inconsistent with the neutrality professed by the Government of which the subscribers are subjects; but they "conceive that the other Belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just grounds of complaint if carried to any considerable extent."

I venture to think that, if the aggrieved Belligerent had "just grounds for complaint" for such acts against the neutral State, it would also have the right to seek redress by force from the neutral State if those complaints were disregarded. With respect to the legality of loans, if entered into merely with commercial views, the Law officers of 1823 advised as follows:—"We think that, according to the opinion of writers on the law of nations, and the practice which has prevailed, they would not be an infringement of neutrality; but if under colour of a loan gratuitous contribution was afforded without interest, or with mere nominal interest, we think such a transaction would fall within the opinion given in answer to the first question" [as to subscriptions]. With respect to prosecuting subscribers, they advise thus:—"Reasoning upon general principles, we should be inclined to say that such subscriptions in favour of one of the belligerent States being inconsistent with the neutrality declared by the Government of the country, and with the law of nations, would be illegal, and would subject the parties concerned in them to prosecution for a misdemeanour on account of their obvious tendency to interrupt the friendship subsisting between this country and the other Belligerent, and to involve the State in dispute, and possibly in the calamities of war." They add some practical remarks on the improbability of such a prosecution being successful.

of the belligerent armies, or on board of one of the belligerent war-vessels. The international illegality of such conduct is, as a matter of principle, unquestionable; but the practice is ancient, almost universal, and is by many regarded as inveterate. Yet it is manifest that assistance may in this manner be given to one of the warring parties to such an extent as materially to influence the event of the contest. Let us suppose the case of a belligerent country, or of a belligerent party in a country where civil war rages, with a numerous, a brave, and a zealous population, but with few regular troops, and with very few of its members who have had any experience of warfare. If some hundreds of professional military men from a foreign country, who are well trained themselves, and who are capable of training and of leading others, join the armies of such a country or party as we have supposed, they will do very much to ensure its success in the war. Nay, the accession of two or three individuals, or even of a single individual, may be, and is likely to be, of incalculable importance, if generalship of a high order is thereby obtained. The neutral State, whence such officers and generals were supplied, must be regarded as the source of the favoured Belligerent's chief military efficiency. The adversary, whose prospects of success are proportionately diminished, naturally and reasonably regards the so-called Neutral as a prime cause of his difficulties and disasters. If the neutral State, after complaint and remonstrance, does not exert itself to the best of its ability to check such practices on the

The practice common, but against international principle.

Effect of such assistance.

part of its subjects, the aggrieved adversary appears, on every principle of natural justice, and according to every rule and analogy supplied by International Law, to have ample grounds for treating such a wrongdoer as an enemy, and for seeking redress by arms.

State's liability for its subjects' acts.

565. As we have had occasion more than once to observe, the general principle is certain, that it is a State's duty to prevent its subjects from injuring other States, or to make reparation for such injuries if they have been committed; but it is equally certain that this duty is not absolute or unlimited. The obligation attaches only when the wrongful acts committed by individual subjects might have been prevented by their Government, if the State had provided itself with reasonably sufficient laws and legal process, and if it had enforced those laws and employed that legal process with honest earnestness and reasonable vigilance*.

In the chapter on the collision of rights of States I have dealt at great length with the question of what amount of *dolus* or *culpa* on the part of a State must be proved in order to fix it with responsibility for the internationally wrongful acts of its individual members. I refer the reader to that part of this treatise, as to the standard by which the conduct of States in such matters must be judged, and as to the practical application of that standard. I have in that chapter laboriously, if not successfully, analyzed the "due diligence" which a State is bound to observe—that is to say, its duty not to neglect to provide itself with laws,

* See *suprà*, pp. 157–163; and p. 314.

and a system of process, by which it may control those within its jurisdiction from injuring other States, and, secondly, its duty to enforce those laws and process with honesty, vigilance, and vigour*.

Restraints on Neutrals' liberty of commerce and of conveyance on the high seas.

566. In mentioning the general nature of the claims put forward on behalf of Neutrals, it was said that these claims extended to the right of the members of a neutral State to pursue their customary occupations of commercial conveyancers and carriers, unmolested by Belligerents, who thought fit to quarrel among themselves. But in this department of neutral rights it is universally admitted that "the rights of a nation, as regards trade with another nation, do undergo very considerable modifications when such second nation engages in war with a third; and when it is said by some writers that neutrality is only the prolongation of the state of peace between the Neutral and the Belligerent, this language must be taken with considerable allowance; for it is certain that, as regards trade and commerce, the rights of the peaceful Neutral undergo very serious diminution. By the admitted rules of International Law, a Belligerent may seize articles contraband of war in transit by sea from the Neutral to his enemy. By blockading his enemy's port he may shut out [from that port] the commerce of the Neutral, even in articles not capable of being applied to warlike use"†.

567. We will therefore now proceed to consider the liabilities of neutral traders and carriers to have

* See *suprà*, pp. 315–345.

† Sir Alexander Cockburn, Judgment in Geneva Arbitration, Blue Book, p. 12.

their goods and vessels seized on the high seas by a Belligerent under either of the two states of circumstances indicated in the passage which has been just quoted from Lord Chief Justice Cockburn's Geneva judgment.

Laws of Contraband and Blockade.

To use the short familiar terms on this subject, we will examine the International Laws of Contraband and Blockade. We must also devote some attention to the rights (whether antiquated or still existing) of a Belligerent to take out of a neutral ship and to appropriate the goods of the Belligerent's enemy, which that ship is conveying; and we must not leave unnoticed the doctrine maintained and practised until lately by some important maritime nations, that the goods of a neutral, if placed by the neutral in the ship of one of the Belligerents, become liable to seizure by the cruisers of that Belligerent's enemy. The law as to Visitation and Search is necessarily connected with the law as to any right of a Belligerent at sea over either the goods or the vessels of Neutrals.

Belligerent's claim to seize enemy's goods on board of neutral ship.

Also claim to seize neutral goods if on board enemy's ship.

Visitation and search.

568. We will begin with the law of Contraband. The general effect of it may be thus stated:—A Belligerent has by International Law a right to seize at sea, and to appropriate or destroy articles, to whomsoever they may belong, which are calculated to aid the Belligerent's enemy in the war, and which are being conveyed by sea to that enemy's territory.

General nature of law of Contraband.

569. There may be contraband persons as well as contraband goods. This may be explained in the words of Field:—"Persons are contraband of war when impressed with the military character of the

Other contraband articles besides goods.

hostile nation, or when on their way for a military purpose in aid of such nation, but not otherwise"*.

Contraband persons.

In another paragraph the same Jurist defines "persons impressed with military character" as meaning "those who constitute a part of the armed forces by land or by sea of a nation, and those who are connected with the operations thereof by the express authority of the nation"†.

570. Some further observations as to contraband persons will be made presently, and also as to contraband documents and contraband ships; but by far the greater part of the cases, in which the law of contraband comes under discussion, have relation to contraband goods.

Belligerent's rights on the high sea more ample than in the neutral territory.

571. There are many things which a Belligerent has a right to seize at sea, if destined for his enemy, though he would have no ground for complaint in respect of their sale or preparation by a subject of the Neutral in neutral territory, or of any thing being done with them, by the neutral manufacturer, trader, or inland carrier, within that territory, though done with the ultimate purpose of the other Belligerent being supplied with them.

Distinction drawn by Sir Travers Twiss.

Sir Travers Twiss, in his chaper on the Rights and

* "*Contraband* is a term of Positive Law, and in its primary sense denotes something prohibited by *ban* or edict." See Sir Travers Twiss, p. 233: he gives instances of the earliest known uses of the Latin, Italian, Spanish, and French equivalents of our English word. It is sometimes more fully phrased as "Contraband of War." It has certainly for some centuries had "a recognized acceptation amongst nations in reference to a branch of maritime trade, which was prohibited to merchants in time of war" (ib. p. 234).

† Dudley Field, Draft International Code, pp. 545, 707.

and Duties of Neutral Powers, points out the distinction which exists between trade which is carried on within the territory of a neutral Power, and trade which is carried on upon the high seas. "By the Law of Nations the sovereignty of an Independent State over its own territory is absolute; and its laws are binding upon all persons who come within its territory. . . . . But if the merchant ventures beyond the confines of neutral territory the case is different." The high seas are *nullius territorium*. If a Belligerent finds that articles calculated to aid his enemies in making war against him are being conveyed on the high seas to his enemies, he may exert his natural right of self-defence by seizing them, although they are the property of a Neutral, and although they are being carried in a neutral vessel.

Seizure of contraband at sea not hostility against neutral State.

572. In so seizing such goods the Belligerent is not considered to commit an act of hostility towards the neutral State to which the owner of the goods belongs. And, conversely, the neutral State is not considered to have failed in its duties of Neutrality, because it does not restrain or punish its subjects who seek to carry such goods across the seas to a Belligerent. The neutral State is not bound to apply its municipal law, or the machinery of its executive, to the prevention of contraband traffic, or to the prevention of breaches of blockade. These closely connected matters* make an exception to the general

Neutral State not bound to enforce Law of Contraband.

* "In principle there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade" (*per* Dr. Lushington, 'The Helen,' Law Rep. 1. A. & E. 5).

principle of Jurisprudence, according to which, as we have seen, every civilized nation is bound to treat the rules of International Law as incorporated with its own national judicial system. But as to shipping articles of contraband for a Belligerent, or as to shipping goods of any kind for a blockaded port, International Law enforces its own decrees, and Municipal Law takes no action. In the very important case of 'The Helen,' decided about twelve years ago in the British High Court of Admiralty, the very learned and able judge who then presided there, the late Dr. Lushington, cited and adopted the jural doctrine on this subject, which had been declared by the American Chief Justice Parsons, in a case before the Supreme Court of Massachusetts* :—"It is agreed by every civilized state, that if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the Law of Nations, that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own

Dr. Lushington's judgment in 'The Helen' cited.

* Richardson *v.* The Marine Insurance Company, 6 Massachusetts Rep. 112. The case of 'The Ellen' is reported in Law Reports, A. & E. vol. i. p. 1.

laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other hand, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations; but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it"*.

* Mr. Hall, in his treatise on the Rights and Duties of Neutrals, cites the following arguments of Lord Brougham, which serve to show that the prevailing practice is the best for the general good:—"No Power can exercise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No Power can therefore be effectually responsible for the conduct of all its subjects on the high seas; and it is found that it is more convenient to intrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations, checking injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a Government were to be made responsible for each act of its subjects, and a negotiation were to ensue every time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to Neutrality, or the affairs of

573. We next have to consider what goods are Contraband. Many questions have arisen on this subject; and opinions as to the character of several articles have varied under changes of time and circumstance.

What goods are Contraband?

574. It is usual to make a classification of, 1st, goods that are absolutely contraband, and, 2ndly, goods that are conditionally contraband. Some jurists deny altogether the doctrine of conditional contraband; others seek to limit its operation very narrowly*. But it has been fully recognized by the Courts of England

Classification into Absolute Contraband and Conditional Contraband.

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the belligerent and neutral both stand still."

Some jurists desire stringent municipal laws against dealing in contraband and in blockade-running (see Phillimore, iii. 230; and Woolsey, p. 298, n.). But the rules of International Law on the subject are as stated in the text; and I believe that more harm than good would be introduced by the proposed change. See the passage from Lord Brougham cited *suprà*, p. 608, n.

Sir Travers Twiss (p. 296 *et seq.*) cites several strong authorities as to the existing law on the subject. One of the clearest is the following passage from an official opinion of the Attorney-General of the United States, given on the 20th January, 1796:—"If the individual citizens of the United States carry on a contraband commerce with either of the Belligerent Powers, neither can charge it upon the Government of the neutral nation as a departure from neutrality; and it is not considered as a duty imposed upon a nation by a state of neutrality to prevent its seamen from employing themselves in contraband trade; nor are there to be shown any instances where a neutral nation has exercised, or attempted to exercise, its authority in restraining practices or employments of this kind."

* See the opinions of Bynkershoek, Vattel, Lampredi, Valin, de Hautefeuille, Ortolan, and others, cited and commented on in Sir Travers Twiss's work, p. 268 *et seq.* See also 3 Phillimore, p. 325; Abdy's Kent, p. 356; Halleck, p. 584; Woolsey, p. 302; Sheldon Amos's Manning, p. 532; Whea-

and the United States*, which may be safely regarded as the highest authorities on the subject. In the description which I am about to give of Contraband, both absolute and conditional, I shall chiefly follow the Manual of Naval-Prize Law, by Mr. Godfrey Lushington, which was issued by the British Admiralty in 1866, for the use of officers of Her Majesty's Navy in time of war.

Goods Absolutely Contraband.

575. We will take first the class of goods which are Absolutely Contraband.

All goods fit for purposes of war only, and certain other goods which, though fit for purposes of peace, are in their nature peculiarly serviceable to a Belligerent in actual warfare, are, if found on board a vessel that has a hostile destination (a phrase to be explained

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ton, part iv. ch. iii.; Hall, p. 98; 2 Calvo, pp. 85, 266; Dudley Field, Draft Outline of International Code, p. 548.

* "The classification of goods as contraband and not contraband, which is best supported by American and English decisions," says Chief Justice Chase in the case of the 'Peterhoff,' 5 Wallace's U.S. S.C. Rep. 58, "may be said to divide all merchandise into three classes. Of these, the first consists of articles primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege" (cited by Mr. Dudley Field, Draft Outlines of International Code, p. 548).

presently), to be considered as Absolutely Contraband.

576. Next, as to goods Conditionally Contraband. Goods Conditionally Contraband.

"All goods, fit for war and peace alike, on board a vessel which has a hostile destination, are Conditionally Contraband; that is, they are contraband only in case it may be presumed from circumstances* that they are intended for purposes of war. This presumption generally arises when such hostile destination of the vessel is either the enemy's fleet at sea or a hostile port used exclusively or mainly for naval or military equipment."

The importance of ascertaining that goods, the character of which is *per se* doubtful, goods which are often called by jurists "*Res ancipitis usus*," are destined not only for the territory of a Belligerent, but also for some particular locality in which armaments and expeditions are collected and prepared, will be made clear by reference to part of Lord Stowell's Importance of precise destination.

* A good illustration of how the special circumstances of the case may make goods contraband which would not generally be so, is given in Ward's Essay on Contraband. He refers to bulls' hides as being goods "which are in themselves seemingly a very innocent article of traffic; and in the American war neutrals might for a long time have safely supplied them to Spain. But when the floating batteries destined for the destruction of Gibraltar were fitting at Algesiras, and it was known that hides were to be the chief article of defence [of the floating batteries] to be used in that famous attack, I have no doubt that a ship loaded with hides, and destined for that part of equipment, with a knowledge that they were then wanted, might very justly have been stopped, and even confiscated." See Sir Travers Twiss, p. 276; Sheldon Amos's Manning, p. 353.

judgment in the case of the Jonge Margarethe*.

Judgment of Lord Stowell.

"The most *important distinction* is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test: if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate, or other ships of war, may be constructed in that port. *Contrà*, if the greatly predominant character of a port be that of a port of naval or military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is not impossible that the articles might have been applied to civil consumption; for, it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful."

This law applies to contraband articles sent to fleet or army in a station out of its own territory.

577. This law has been fully adopted by the American Courts, which have also expressly established the point, that where a supply of contraband articles is destined for a belligerent's fleet or army which is

* Reported in 1 Robinson, 194.

located beyond its own territory, such contraband articles are liable to seizure by the other Belligerent.

578. A long list of articles Conditionally Contraband is given in the British Admiralty Manual; and other lists, not identical, but not varying much from the British, may be found in Abdy's edition of Kent's Commentaries, and in Dana's Wheaton. The articles that require special mention are coal and provisions. From the rapidly increasing use of armed steamers in naval warfare it is probable that coal will be regarded as contraband, if destined for any harbour or any port whatever of the coast of a belligerent where war-steamers can in ordinary weather lie-to, so as to take in supplies of coal for the continuance or renewal of their cruising against their enemy*.

Articles Conditionally Contraband.

Coal.

579. There have been very many disputes (and some of ancient date) as to whether provisions are ever to be regarded as contraband of war. The rule which has now for nearly a century been adopted by the British Courts of Admiralty, may be thus stated in

Provisions.

* Dr. Abdy, in his edition of Kent, p. 360 n., cites an official communication of the British Government in 1859, in answer to whether coal was to be regarded as contraband. "The Prize Court of the captor is the competent tribunal to decide whether coal is or is not contraband of war; and it is obviously impossible for Her Majesty's Government, as a neutral sovereign, to anticipate the result of such decision. It appears, however, to Her Majesty's Government that, having regard to the present state of naval armaments, coal may in many cases be rightly held to be contraband of war—therefore that all who engage in the traffic must do so at a risk, from which Her Majesty's Government cannot relieve them."

See also page 585, *suprà*, as to the character of supplies of coal to a belligerent.

Lord Stowell's rule.

the words of Lord Stowell :—" Generally they [provisions] are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it." This rule has been fully adopted by the Supreme Court of the United States*.

Right of Preemption.

580. The application of the doctrine of Occasional Contraband is in some cases really hard, and is in more cases apparently harsh towards the neutral owners, especially where the articles objected to are articles which are the produce of the neutral country; and in no class of cases does the harshness seem greater than when the supply consists of provisions. This circumstance probably induced the British Courts at the close of the last century and at the beginning of the present century to favour in such cases the adoption of the Law of Preemption, which Lord Stowell himself has called a kind of compromise between the belligerent and the neutral†. Under the claimed right of Preemption the captor does not confiscate the goods to his own benefit without any compensation to the shippers; but he takes possession of them as if sold to himself, the price being settled by himself; and the standard of valuation is not the same which might probably have been obtained in the enemy's ports, but the cost price in the producing country, with an addition of 10 per cent. as fair profit‡. In the seventeenth century it was usual

* Abdy's Kent, p. 359.

† Robinson's Reports, vol. i. p. 241.

‡ Woolsey, p. 307.

for Belligerents, if powerful at sea, to assert and exercise a right of Preemption over a great variety of articles, if intercepted on the ocean. But the practice had become almost obsolete; and the revival of it by England*, as applicable to provisions, has been strongly objected to by other nations. It is probable that it would not be enforced hereafter. No instructions to exercise it are contained in the recent British Admiralty Manual, which has been already referred to in this chapter†.

581. The subject of the proof of the hostile destination of contraband goods is one attended with considerable difficulty; and questions on it seem likely to multiply in future wars. The general rules on the subject are thus laid down in the British Admiralty Manual. Contraband destination.

A. "A vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral. General rules according to British practice.

B. "A vessel's destination should be considered hostile, if either the port to which she is bound, or any intermediate port at which she is to call in the course of her voyage, be hostile, or if in any part of her voyage she is to go to the enemy's fleet at sea. It

* The French National Convention had set the example by a decree of May 9, 1793, for the seizure of neutral ships laden with provisions and bound for an enemy's port. The provisions were to be paid for at their value in the port of destination. See note in Woolsey, p. 460, and 3 Phill. p. 335.

† There is, however, a clause (38) respecting it in the Naval-Prize Act, 1869.

frequently happens that a vessel's destination is expressed in her papers to be dependent upon contingencies. In such case the destination should be presumed hostile, if any one of the ports which under any of the contingencies she may be intended to touch at or go to be hostile; but this presumption may be rebutted by clear proof that the master has definitively abandoned a hostile destination and is pursuing a neutral one.

C. "The destination of the vessel is conclusive as to the destination of the goods on board. If, therefore, the destination of the vessel be hostile, then the destination of the goods on board should be considered hostile also, notwithstanding it may appear from the papers or otherwise that the goods themselves are not intended for the hostile port, but are intended to be forwarded beyond it to an ulterior neutral port. On the other hand, if the destination of the vessel be neutral, then the destination of the goods on board should be considered to be neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination to be attained by transshipment, overland conveyance, or otherwise"*.

Conflicting American doctrine as to proof of destination of cargo.

582. So much of these rules as considers the destination of goods on board of a vessel to be conclusively determined by the destination of the vessel, is in accordance with the doctrine hitherto maintained by the British Courts; and is, I believe, also in conformity with the general opinion formerly held by the

* Manual of Naval Prize Law, p. 37.

great majority of jurists on the subject. But it is in conflict with a large number of recent American decisions, and it is nearly certain to be disputed by powerful naval belligerents in future wars. According to the doctrine now maintained by several high authorities, and repeatedly enforced by the Courts of the United States, articles contraband of war, which the belligerent can prove to be destined for his enemy's use, are liable to seizure, though the ship in which they are found is destined to take them only to some neutral port, whence they are to be forwarded by another conveyance to their hostile ultimate destination.

Real ultimate destination of the goods themselves is made the test.

583. The same question arises in the case of neutrals' goods not being contraband of war, but intended to be eventually landed at a port under actual blockade, when such goods are captured in a ship which is to convey them for part of their journey.

Same question arises in law of Blockade.

584. The tests of liability to seizure are most tersely and clearly given in the case of the 'Stephen Hart.' The Supreme Court of the United States there laid down the following principles as the rules by which the Prize Courts of the United States would be guided:—First, with reference to the broad issue, whether the adventure of the 'Stephen Hart' was the honest voyage of a neutral vessel with neutral goods from one neutral port to another, or a simulated voyage with a contraband cargo for the enemy's use; the court said, the commerce in such a case is in the destination and intended use of the property, not in

the incidental ancillary and temporary voyage; and the question must turn, not on whether the vessel is documented for and sailing upon a voyage from one neutral port to another, nor whether the immediate destination of the goods is to a port of the enemy, but the true test is this, "Are the contraband goods destined for sale or consumption in the neutral market, or is the direct and intended object of their transportation to supply the enemy with them?" *

Case of the 'Peterhoff.'

585. In another American case, that of the 'Peterhoff,' a neutral vessel was condemned because (*inter alia*), "although ostensibly on a voyage between the neutral ports of London and Matamoras, she was laden with a cargo composed largely of contraband goods destined to be delivered either directly or indirectly by transshipment to the enemy's port and market, and for the enemy's use" †.

Case of 'The Springbock.'

586. The case, on the subject, which has drawn most attention to it from Continental as well as from English and American writers, is that of the 'Springbock,' an English vessel captured in February 1863, while on a voyage from London to Nassau, by a cruiser of the Northern States. Both ship and cargo were condemned by the American Prize Court in the first instance. On appeal, the Supreme Court of the United States reversed the decision so far as regarded the ship; but confirmed it so far as regarded the cargo, for reasons set out in the judgment; of which one main part was that the port of Nassau was

* Abdy's Kent, p. 373.

† See case cited in Abdy's Kent, p. 371, n.

not the real destination of the cargo. There were a few articles contraband of war among the goods condemned; and the judgment of the court below had been mainly based on the assumed contraband nature of the cargo. But these articles were trifling in amount and value; and the Supreme Court dealt chiefly with the case on the ground of the assumed proof that the whole cargo was destined for a blockaded port.

Grounds of condemnation of cargo by the United States' Supreme Court.

The British Government was applied to by the owners of the condemned cargo to demand from the American Government restitution of the seized goods or compensation for the seizure. No further judicial proceedings could possibly be taken after the Supreme Court of the nation of the captors had given judgment. "But," as Vattel observes, "the sentence of a Prize Court of the last resort, involving "une injustice palpable et évidente (a palpable and manifest miscarriage of justice), cannot be considered as final, *internationally*; and in such a case diplomatic representations and, if necessary, political action and even reprisals and war on the part of the aggrieved Power, are reserved for the redress of the wrong sustained by its subjects" *.

Opinions of British jurists against the legality of that condemnation.

The opinion of the Law officers of the British Crown was taken on the subject by the Government.

* From Dr. Gessner's 'Juridical Review of the Case of the Springbock,' p. 9. "Not only may a State demand indemnity for the property of its citizens unlawfully condemned by a foreign prize court, but, if refused, it may resort to reprisals or even to war" (Halleck, p. 763. See too Abdy's Kent, p. 274, cited *suprà*, p. 560).

Those officers were the present Sir Robert Phillimore (Queen's Advocate), Sir W. Atherton (Attorney-General), and Sir Roundell Palmer (now Lord Selborne) (Solicitor-General). The owners of the cargo took also the opinions of Mr. Mellish, now Lord Justice Mellish, and of Mr. Harcourt, now Sir William Harcourt. Those opinions have been published; they concur in agreeing with the Supreme Court of the United States, that "the real question on which the question must turn is the original destination of the cargo." If it were intended that the goods should be sold at the neutral port, Nassau, to which the 'Springbock' was bound, the goods would not be liable to seizure, however probable it might be that the purchaser or purchasers of them at Nassau might try to carry on his purchase to a blockaded Confederate port. But if it was originally intended that the goods should go beyond Nassau, and their voyage in the 'Springbock' was in part-fulfilment of that original design, then they were liable to capture. The English advocates carefully reviewed the reasons given by the condemning court for holding this latter view; and they demonstrated that those reasons were partly founded on mistake of fact, and partly consisted of erroneous deduction. They advised that the condemnation was therefore wrong and injurious according to International Law. A claim for compensation was preferred by the owners of the cargo before the Mixed Commission, which was appointed by treaty to investigate this and numerous other similar claims. The Commission rejected the claim, but without giving any reasons for their decision.

Claim for compensation preferred before Mixed Commission of Claims.

Claim rejected.

587. This case gave rise to much comment among Continental as well as among English and American jurists. The general opinion appears to be that the decision of the United States' Supreme Court, condemnatoryof the 'Springbock's' cargo, was wrongful, not because the destination of the ship ought to have been taken as conclusive proof of the destination of the cargo, but because the circumstances of the case by no means warranted the Prize Court in disregarding the presumption in favour of the neutral destination of the cargo, which the destination of the ship created. The case will be found discussed in Dr. Gessner's tract on the case, and in M. Calvo's second volume on International Law*. The subject is very fairly and temperately considered in the preface to Mr. Godfrey Lushington's Manual, issued by the British Admiralty for the guidance of its naval officers. As has been seen from the quotations which I have already given, Mr. Godfrey Lushington in the body of his work keeps to the old legal doctrines acted on by the British Courts during the great war of the end of the last and of the beginning of the present century. But in his preface he sets out the opposite opinions held by the American tribunals, and he balances the reasonings on either side. As he truly states, the introduction and rapid development of steam-navigation has much to do with the establishment of the new doctrine. "Steam-navigation has much facilitated the carrying of contraband. A more stringent scrutiny, therefore, will be required in to the real destina-

Celebrity of this case.

General opinion adverse to the decision.

Arguments as stated by Mr. Godfrey Lushington.

* Page 471.

tion of a suspected vessel. An adventurer carrying contraband in a swift steamer will not hesitate to adopt for a fictitious destination a port hundreds of miles apart from the port to which he is really bound. What is the intervening distance to him? A delay perhaps of a day or two. Similar considerations weaken the presumption of a vessel's innocence. Lord Stowell restored a sailing vessel captured whilst ostensibly going to a place separated from a port of naval equipment only by a headland, and laden with a cargo of goods which, if she had been destined to that port, would unquestionably have been contraband. A steamer captured under like circumstances could nowadays hardly escape condemnation.

"Connected with the subject of contraband is the important question of the mode of ascertaining the destination of goods on board a vessel. In this volume it has been treated as conclusively determined by the destination of the vessel. This view is clearly to the interest of Neutrals. On the other hand, the interest of the Belligerent, when endeavouring to intercept contraband goods from going to his enemy, is to look beyond the destination of the vessel to the destination of the goods.

"Practically either view leads to serious difficulties. If the Belligerent is left to carry out his own view, there is no saying when and where a vessel may not become liable to detention for carrying contraband. For instance, in the late war between Spain and Chili, a British mail steamer plying regularly between Southhampton and Havre, and going no further, might, if

she carried munitions of war, which were intended to be transshipped at Havre to a vessel bound to a Chilian port, have been stopped in the British Channel by a Spanish frigate, and carried off to a Spanish port. On the other hand, if the Neutral view be established, then, under certain circumstances, a Belligerent might as well give up all attempt to stop contraband. Of this the late American war was an example. Matamoras, a neutral port, was quite close to the Southern coast blockaded by the Federal cruisers. Was it permissible for a British vessel to carry to Matamoras a cargo of munitions of war destined to be immediately transported thence to a Southern port? The American Prize Courts pronounced that it was not permissible; and the British Government did not remonstrate, no doubt because in the particular instance which occurred the vessels captured were practically transports in the service of the Confederates, if not actually destined themselves to run the blockade. Upon the whole it would seem probable that neither will a strong Belligerent submit to the Neutral view, nor a strong Neutral to that of the Belligerent.

"Judging by principle, the view of the Belligerent seems correct. A neutral vessel which forwards munitions of war part of their way to their ultimate destination to one of the Belligerents is really aiding and abetting in the war, and this on the high seas"*.

588. On the other side there is the high authority of the American jurist, Mr. Dudley Field, who, in his

Mr. Dudley Field's opinion in favour of the Neutral Owner.

* British Admiralty Manual, p. xiv.

projected outline of a Code of International Law, directs that "The destination of the ship is conclusive as to the destination of the goods on board." He quotes the rule as set out by Mr. Godfrey Lushington in the text of the British Admiralty Manual, which has been already cited in this chapter; and he states that this rule is preferred by him "as being in the interest of Neutrals."

Reasons for preferring the claim of the Belligerent in this instance.

589. This is a very important reason; and I have in preceding paragraphs of this chapter asserted as general principles that the standpoint of the Neutral's interest is to be taken when we have to contemplate conflicting claims, and that a preferential regard for Neutral interest is in accordance with true utilitarianism. But in the present case it certainly seems to me that, if International Law is to be considered as ever giving a Belligerent the right to seize neutral goods because they are contraband of war, or because they are destined for a blockaded port, the right so allowed cannot on any sound reasonings of jurisprudence be treated as liable to be nullified by the mere trick and colourable pretext of first placing the objectionable goods in a ship which is to stop at a neutral port, whence they can readily be passed on to the hostile territory, which is their true destination. In the administration of all Law, International as well as Municipal, realities and not shams are to be regarded. The artifice which is in fraud of a law, is itself a breach of that law. Unquestionably there ought to be very full and clear proof of such artifice being practised as well as planned. The burden of

But not for upholding the decision in the 'Springbock' case.

proof necessarily lies on the captors, who impute liability to seizure. Nay, more, the neutral destination of the ship ought to be looked on as presumptive proof of the neutral destination of the cargo; and the evidence on behalf of the captors to outweigh such presumption ought to be very different in quality and amount from what was held sufficient in the case of 'The Springbock.' But if full and clear evidence is adduced that the contraband goods are not destined for sale and consumption in the neutral market but that the direct and primary object of their shipment was to forward them to or towards the enemy, then the Belligerent, against whom they were destined to be used, has a right to protect himself by arresting and seizing the intended instruments of ill to him while they are on the seas, which are the highways of all nations but the territories of none. As for the extreme case suggested by Mr. Godfrey Lushington in the cited part of his preface, the imaginary case of the British steamer that plies between Southampton and Havre being stopped in the Channel by a Spanish cruiser because she had war munitions on board which she was to leave at Havre, and which were to be afterwards taken by some other conveyance to Chili, then at war with Spain, we may answer (if it be necessary to answer a difficulty supposed to emanate from a highly improbable occurrence*) that in this, as in all

* "Ex his, quæ forte uno aliquo casu accidere possunt, jura non constituuntur" (Celsus in 1 Dig. iii. 4). "Ea, quæ raro accidunt non temere in agendis negotiis computantur" (Ulpian in 50 Dig. xvii. 64).

other matters of international jurisprudence, the grievance proved must be real and substantial, and not of infinitesimally small operation. I do not think that the English steamer, under the suggested circumstances, would be held by any fair and sensible tribunal to have incurred the risks which are indicated, especially if the amount of munitions was trifling, and if their conveyance in no degree determined the steamer's voyage. At any rate, as Mr. Godfrey Lushington has ably demonstrated, there are much greater grievances to be apprehended on the other side; and in a balance of evils we must avoid the heavier scale, especially when it is also the scale of injustice.

Penalty for conveyance of contraband goods.

590. According to modern usage the penalty for attempting to convey contraband goods by sea to the territory of a Belligerent is confiscation of the goods, if captured by the other Belligerent. The shipowner in such a case loses his claim to freight, and he is not entitled to any compensation for the detention of his vessel. The rules on this subject were formerly somewhat varying; but, generally speaking, the old usage was more severe than the modern on Neutrals; and the ship which carried contraband goods was frequently treated as itself liable to confiscation. But by practice, which may be considered as having grown into law, the ship is now spared, unless she is the property of the owner of the contraband articles, or unless simulated papers have been employed in respect of her carriage of them. In both these cases the ship is confiscated. So also when the owner of the contraband goods has other goods on board, the whole of

them are forfeited—the principle followed being that explained by Lord Stowell, the principle that "where a man is concerned in an illegal transaction the whole of his property involved in that transaction is liable to confiscation"*.

Contraban· ships.

591. A ship itself may be a contraband article. Neutral vessels are contraband, and are liable as such to be seized and confiscated, if they are destined to go to the enemy, and to be used by the enemy for the purposes of the war†.

Contraband despatches.

592. A ship may become liable to be seized and confiscated for carrying contraband despatches. This part of the law of contraband is no older than the present century; but it is fully established by authority as well as based on sound reasoning. President Woolsey‡ says of it, "Sir William Scott (Lord Stowell) seems to have struck out this rule as a deduction, and, we may say, as a fair deduction, from the general obligation of neutrality. The general doctrine of the English courts is this:—Despatches are official communications of official persons on the public affairs of Government. Letters of such persons concerning their own private affairs, and letters written by unofficial persons are not despatches. Communications

* British Admiralty Manual, p. 39; Woolsey, p. 308; Halleck, p. 572. According to the English authorities a ship is also liable to confiscation when carrying contraband goods contrary to express stipulations of a treaty. See Admiralty Manual, p. 39; but this "is not generally acknowledged." See Woolsey, p. 309.

† Admiralty Manual, p. 42; Halleck, p. 583.

‡ Page 311. See also Abdy's Kent, p. 375; Admiralty Manual, p. 42; Halleck, p. 642 Calvo, vol. ii. p. 497.

from a hostile Government to one of its consuls in a neutral country, unless proved to be of a hostile nature, and despatches of an enemy's ambassador resident in a neutral country are excepted from the rule, on the ground that they relate to intercourse between the hostile State and a Neutral, which is lawful, and which the other Belligerent may not obstruct. The comparative importance of the despatches, if within the rule, is immaterial.

"In order to make the carrying of enemy's despatches an offence, the guilt of the master must be established. If the despatches are put on board by fraud against him, no penalty is incurred by the ship. If he sails from a hostile port, and especially if the letters are addressed to persons in a hostile country, stronger proof is needed that he is not privy to a guilty transaction than if the voyage began in a neutral country and was to end at a neutral or open port.

"If the shipmaster is found guilty of conveying hostile despatches, the ship is liable to condemnation, and the cargo is confiscable also, both *ob continentiam delicti*, and because the agent of the cargo is guilty. But if the master is not such an agent his guilt will not extend beyond the vessel.

"This rule, in its general form, if not in its harsher features, may be said to have passed into the law of nations. Not only the declarations of England and France, made in the spring of 1854, but the contemporaneous ones of Sweden and of Prussia sanction it; and the Government of the United States in one instance has accepted it as a part of the

law of nations. It is received as such by text-writers of various nationalities, by Wildman and Phillimore, by Wheaton, by Heffter, Marquardsen, and other German writers, by Ortolan and Hautefeuille. The last-named publicist gives a modification of the rule, which, though of private authority, deserves serious attention. Despatches can be transported, says he, from one neutral port to another, from a Neutral to a Belligerent, or from a Belligerent to a Neutral, or finally from one Belligerent port to another. In the three first cases the conveyance is always innocent. In the last it is guilty only when the vessel is chartered for the purpose of carrying the despatches; but when the master of a packet-boat or a chance vessel takes despatches together with other mail matter according to usage, he is doing what is quite innocent, and is not bound to ascertain the character of the letters which are put on board his vessel. Whatever may be thought of this, it may be seriously doubted whether a neutral ship conveying mails, according to usage or the law of its country, can be justly treated as guilty for so doing. The analogy from articles contraband of war here loses its force. When a war breaks out, a captain ought to know what articles he has on board; but how can he know the contents of mailed letters?"

Case of 'The Trent.'

593. An attempt was made during the late war between the Northern and Southern States of the American Commonwealth to treat the conveyance of ambassadors as the conveyance of "embodied despatches." This was one of the numerous points

which arose out of the seizure of the 'Trent.' The 'Trent' was a British vessel trading, in 1861, on its usual route as a packet-ship, and on a voyage from Havannah to England. Among the passengers on board were four members of the Confederate (the Southern) States, two of whom, Messrs. Mason and Slidell, were in the service of the Government of those States, and on their way to England in that service. The other two were their secretaries. They had been received on board the 'Trent' as ordinary passengers at Havannah, where they had been residing for some weeks. The 'St. Jacinto,' a war-vessel of the Northern States, forcibly stopped the 'Trent,' and forcibly took from her the four persons in question against the remonstrance of the captain of the 'Trent,' who protested that these persons were under the protection of the British flag. The commander of the 'St. Jacinto' caused the 'Trent' to be searched for hostile despatches; but no despatches were found. He released the 'Trent,' which continued her voyage to England; but he carried Messrs. Mason and Slidell and their secretaries to New York. The British Government protested energetically against these proceedings, and demanded the restoration to British protection of the persons who had been seized. Other neutral Powers also memorialized the American Government, pointing out the international illegality of the seizure. Eventually the American Government gave up the prisoners to the British Legation.

594. The "Trent affair," as it is termed, has naturally been the subject of much commentary by

jurists, especially by Dr. Abdy*, by Sir William Harcourt (writing under the style of "Historicus"), by President Woolsey†, and by M. Calvo‡. Perhaps most instruction is to be gained by studying:—the memorial addressed by M. Thouvenel, the French minister, to the American Government; the State-paper of Mr. Seward, the American Secretary for Foreign Affairs, published by him when he gave up the prisoners; and the answer to that document contained in Earl Russell's despatch to Lord Lyons, dated January 23, 1862. The following propositions may be safely asserted:—A. An ambassador to a neutral country cannot be lawfully captured on board a neutral ship. B. "It is simply absurd to say that these men were living despatches"§. C. Neither persons nor despatches are liable to capture if their real and *bonâ fide* destination is a neutral port. Comments of various jurists on this case.

595. But in cases where the neutral vessel's destination is hostile, there is a class of persons who are regarded as contraband of war, and liable to seizure by a Belligerent if found on board of her. This class includes "soldiers or sailors in the service of the enemy, and officers, whether military or civil, sent out on the public service of the enemy at the public expense of the enemy"‖. The penalty for carrying such contraband persons is the confiscation of the vessel and of such part of her cargo as belongs to her owner. But it is to be observed that this liability of the vessel Contraband persons. Penalty. Continuance of liability.

* Abdy's Kent, p. 381.
† P. 310.
‡ Vol. ii. p. 501.
§ Woolsey, p. 311.
‖ British Admiralty Manual, p. 40.

continues only while she has the contraband persons on board. She cannot be seized for having had them on board, as for a committed offence the act of which may be passed but the consequences of which continue.

Shipmaster's knowledge of his passenger's quality presumed.

596. It is laid down by some authorities that the number of contraband officers whom the neutral ships may have on board is immaterial, and that the shipmaster cannot be excused by ignorance of their character. But perhaps these propositions, though in practice mostly true, are open to some qualification. Unquestionably, as a general rule, a wrongdoer's ignorance of the wrongful character of his act is no excuse, if he might have known its character by taking reasonable care, such as was proper for him to take under the circumstances of the case, out of regard to the interests of those whom his act was calculated to affect.

Possible exceptional cases.

But there may be cases in which the captain of a neutral ship receives for conveyance persons who are really officers of a belligerent State, but who come on board under circumstances which do not in the least degree disclose their character or reveal any thing that ought to cause him, as a man of ordinary prudence, to make any special inquiry respecting such travellers or the object of their voyage. The ship may be a packet-ship plying in her accustomed manner for the general conveyance of those who wish to pass between the ports at which she regularly touches; and the objectionable individuals may have taken their passages as ordinary customers. In such a case the conduct of the neutral shipmaster could hardly be said to be

tainted with *dolus*, or with such an amount of *culpa* as to make the ship subject to confiscation, although she might be liable to detention by a cruiser of the other Belligerent while inquiry was made into the circumstances under which she had received on board the enemy-officers*.

Blockade, general right of.

597. A Belligerent may station his war-vessels near to any of his enemy's harbours, or roadsteads, or other parts of the hostile coasts in sufficient strength and number to make it difficult for any ship to reach or to leave such port or other maritime place without exposing itself to be fired into or otherwise impeded by some of the war-vessels so stationed as aforesaid. When and while war-vessels are so stationed, and after the Belligerent has duly notified his intention to forbid and prevent access to and egress from such port or maritime place, his war-ships may seize or may sink any neutral vessels which attempt, or which do certain acts towards attempting the forbidden passage, whatever may be the nature of their cargo, whether contraband or not. This is the Right of Blockade,

* In a case in which Lord Stowell strongly laid down the law of a neutral vessel's liability to confiscation for being engaged to carry well-known military officers of a Belligerent to a port of that Belligerent, he added, "If a military officer were going merely as an ordinary passenger, as other passengers, and at his own expense, neither that nor any other British tribunal had ever laid down the principle to the extent of condemning a vessel for such transportation." — *The 'Friendship,'* Robinson's Rep. vi. 422. See on this subject Halleck, p. 642; Wheaton's Elém. tome ii. p. 161; Hall's 'Rights and Duties of Neutrals,' p. 132; Woolsey, p. 184; 2 Calvo, p. 494.

Antiquity and universality of the right.

one of the most ancient and generally practised of all belligerent rights*, though the questions as to its limits have formed matters of serious international controversy down to our own times.

A right to be kept within limits.

598. The same high authority†, which declares the antiquity and the universality of blockades as lawful operations of war, pronounces also that "The right of blockade is a severe right, a right to be construed strictly, not extended by mere implication"‡.

599. The questions generally arising respecting the application of the Law of Blockade come mainly under three heads:—

Classification of chief questions as to Blockade.

First, as to the sufficiency of the blockading force;

Secondly, as to the sufficiency of notification of the blockade;

Thirdly, as to the legal sufficiency of the act which the neutral vessel has done towards breaking the blockade.

Requisites of a lawful Blockade.

600. The law and the leading judgments (chiefly Lord Stowell's) on the first point will be found well and tersely stated by Mr. Polson in a supplementary essay at the end of his little treatise on the Law of Nations. "In every instance, the blockade must be a blockade in fact, *i. e.* maintained by a force adequate to prevent the ingress and egress of vessels

* See (quoted in page 132 *suprà*) the remarks of Lord Stowell in the case of the 'Huztige Hane,' 3 Robinson, p. 324, in which he held the Barbary States to be bound to be acquainted with the principle of blockade, as it is "an operation of war almost as old and as general as war itself."

† Lord Stowell, see last note.

‡ Case of the 'Juffrow Maria,' 3 Robinson, 154.

(The 'Nancy,' 1 Act. 57); and a mere declaration of blockade will of itself avail nothing (The 'Betsey,' 1 Rob. 93). Under some circumstances, a single ship, and that even if at the time assisting in the blockade of another port (The 'Nancy,' *ut cit.*), or stationed only in the neighbourhood, will be considered as a force adequate to the constitution of a blockade (The 'Arthur,' 1 Dods. 423); and this also may be the case with a squadron at some distance from the port—provided the distance be not too great, so as to prevent the ships acting upon the commerce of the port (Naylor *v.* Taylor, M. & M. 205). The *extent* of a blockade is limited by the capacity of the force blockading, such points being exempt from the blockade which the power of the blockaders is incompetent to reach ('The Ocean,' 5 Rob. 91; 'The Stert,' 4 *ib.* 66)."

What is an "adequate blockading force?"

601. It is obvious that no precise and universally applicable definition can be given of what is an "adequate force." It need not be so large and strong and swift a squadron or fleet as to make a passage against the will of its admiral absolutely impossible; nor must it, on the other hand, be so slight and inefficient that the risk of passage is trifling. Perhaps the best practical definition is that contained in the Manifesto of the Armed Neutrality issued in 1780. "In order to determine what characterizes a blockaded port, that term shall only be applied to a port where, from the arrangements made by the attacking Power with vessels stationed off the port and sufficiently near, there is evident danger in entering the port"*.

* Sir Travers Twiss, p. 197.

Extent of coast that may lawfully be treated as under blockade.

602. It is generally a port that is blockaded; and in legal treatises and in the judgments of Courts on the subject of blockade the word "port" is commonly used without any addition to signify the maritime place which is blockaded. But if an "adequate force" (as above explained) is employed by the blockading Belligerent, there is no limit to the extent of coast along which the right of blockade may be exercised, or as to the number of ports and other landing-places which a single blockade may comprise. Sir Travers Twiss cites the recent instance of the war carried on by the United States of America against Mexico in 1846, when "all the ports, harbours, bays, outlets, and inlets on the west coast of Mexico were declared by Commodore Stockton to be under blockade. The United-States Government on this occasion, in reply to the suggestions of the British Government that such a proceeding savoured of a paper blockade, did not express any doubts of their right to maintain so extensive a blockade; but they stated that under Commodore Stockton's general notification no port on the west coast was regarded as blockaded, unless there was a force sufficient to maintain it actually present, or temporarily driven from such actual presence by stress of weather, intending to return. In the war declared on 28th March, 1854, by the three Allied Powers, Great Britain, France, and the Ottoman Porte against Russia, the combined fleets of Great Britain and France established a blockade of the whole of the Russian Ports in the Baltic and in the Gulfs of Finland and Bothnia"*.

* Sir Travers Twiss, p. 225.

General Utilitarianism requires blockade *de jure* to be limited to blockade *de facto*.

603. It is obvious that the fair interests of Neutrals imperatively require a Belligerent's right of blockade to be checked by allowing *blockades de jure* to extend no further than with respect to such places as are actually blockaded *de facto*. If a State carrying on hostilities against others could, by mere manifestoes and declarations of its own will, acquire the rightful power of seizing and confiscating all neutral ships and cargoes that were voyaging to or from any portion of the seaboard of a whole country (perhaps of a whole continent), the commercial communications of civilized mankind would be ruinously obstructed, and most serious sufferings inflicted on nations wholly innocent of participation in the war. But Belligerents in their vindictive animosity against each other, have frequently endeavoured thus to wound foes at the expense of friends, and to prohibit commerce with extensive territories which they could not or, at any any rate, did not keep under vigilant observation and strict maritime control by predominant naval forces.

Repeated attempts of Belligerents to exaggerate the right.

The "Continental system" of 1806.

604. This eagerness to aggrandize belligerent prerogative at the expense of neutral commerce displayed itself most arrogantly in the attempt to establish what was called "The Continental System" during the war between Britain and the French Empire, in the early part of this century. Napoleon the First, by his Berlin and Milan decrees (1806 and 1807), declared first the whole of the British islands and afterwards the British dominions in all parts of the world to be in a state of blockade, and all vessels whatever that traded to them to be liable to

The Berlin and Milan Decrees.

capture by the ships of France. A similar liability to capture was imposed on every neutral vessel that traded in or carried any article of British manufacture. No ship was to be admitted into any port of France or of the other countries then under the authority or influence of the French Emperor (including nearly the whole continent of Europe) without a certificate of origin, as it was termed, the object of which was to attest that no part of the cargo was of British origin.

The British Orders in Council.

On the other side the British Government issued Orders in Council, which declared France and all the countries in alliance with her to be in a state of blockade, and authorized British cruisers to seize all vessels which were found to have certificates of origin on board as required by Buonaparte's decrees, or which attempted to trade with any part of the world declared by the British orders to be in a state of blockade. All neutral vessels bound to any such port were ordered in all cases to touch first at some British port and to pay custom-dues there, after which they were in certain cases to be allowed to depart to their destination.

Injurious effects on Neutrals and on Britain herself.

Neutral nations, and especially the United States, protested vehemently against these edicts of the two belligerent powers, which, taken together, "amounted to an interdict of the whole foreign trade of all neutral nations." "If neutrals neglected the British Orders in Council they were captured by the cruisers of England, with which the sea was covered. If they paid duties at British ports they were confiscated, if the fact could be discovered, at any port under

French influence"*. These new Laws of War were extensively evaded by "every species of deception by which the real character of the mercantile transaction could be disguised. False papers, false entries, false registers were everywhere produced." The warring Governments themselves found it profitable to issue numerous licenses to let certain vessels pass notwithstanding the decrees and orders. Nevertheless a very great amount of commercial and manufacturing distress was created, of which Britain felt its full share. Extreme illwill was engendered between England and America; and though the Orders in Council were withdrawn in 1812, they contributed greatly to bring about the war of 1812–14 between the two countries.

605. There is, however, little probability that any belligerent Power will again venture on such encroachments on the general liberty of the commerce of nations. By the Declaration of Paris in 1856 it was agreed that blockades, in order to be valid, must be effective—that is to say, maintained by a force sufficient to prohibit in reality [*interdire réellement*] access to the coast of the enemy†. The United States have not become formally parties to this compact; but they have on all

Declaration of Paris prohibiting "Paper" blockades.

* Political Cyclopædia, tit. "Blockade;" Ed. Rev. vol. xii. p. 229; Lord Brougham's Speeches, vol. i. p. 468; Scott's 'Life of Napoleon,' vol. vi. p. 122.

† See observations at page 635 *supra*, on the amount of prevention or impediment which is requisite for the validity of a blockade; and see Dr. Lushington's judgment in The 'Franciska,' Spink's Rep. xi. p. 128, cited by Sir Travers Twiss, p. 199 of his treatise.

occasions consistently maintained that a blockade, in order to be recognized as internationally legal, must be made actually effective "by the presence of a competent force, stationed and present at or near to the entrance of the port *.

Temporary absence of the blockading force, *animo redeundi*, does not terminate the blockade.

606. According to the great majority of authorities on the subject, a blockade is not terminated by the temporary absence of the blockading squadron, produced by accident, as by a storm, when there is a full intention to return as soon as practicable. "Such accidental removal of the blockading force, if it be only for a very short time, does not suspend the legal operation of the blockade; and an attempt to take advantage of such an accidental removal is regarded as a fraudulent attempt to break the blockade." General Halleck, after using the words just quoted, adds the following qualification:—"But if the blockading forces should be so scattered or injured by the storm as to be unable to resume their station without repairs and within a reasonable time, the blockade will be considered as terminated, in the same manner as if the blockading squadron had been driven away by a superior force of the enemy" †.

* Abdy's Kent, p. 365.

† Halleck, p. 539. See also Travers Twiss, p. 199; Abdy's Kent, p. 365; Wheaton's Elém. tom. ii. p. 175; British Admiralty Manual, p. 43; 3 Phillimore, p. 386. Opinions of a different nature have been expressed by Ortolan and others. The various theories on the subject are collected and contrasted in Calvo, vol. ii. p. 559 *et seq.* M. Calvo gives his own opinion as follows:—"En résumé, il semble généralement admis que la cessation de l'investissement réel fait cesser le blocus avec tous ses effets; que l'éloignement même temporaire de l'escadre bloquante, pour une cause

607. We next come to the question, What notice of a blockade is necessary in order to justify the capture and condemnation of a neutral vessel for attempting to break it?

What notification of a blockade is necessary?

Blockades are now almost always established by direction of the supreme Government of one of the Belligerents. When this is done, it is now the invariable rule for the Government, which so directs a blockade, to give formal and public notification of it to the Governments of neutral States; and when this has been done, the notice to the neutral Government is held by the English and by the American courts to be "a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is the duty of the neutral Government to communicate the notice to their own people"*. This is termed "constructive" notice. But it may happen that hostilities are carried on in parts of the world so distant from the seat of supreme Government that commanders of a Belligerent's forces in those regions must often, with regard to blockades as with regard to many other operations of war, act without previous communication with their sovereign, in order

By whom may blockades be established?

Official Government notice.

This operates as "constructive notice" to individuals.

Blockades may be established by commanders in distant regions.

provenant de son propre fait ou par l'intervention d'une escadre ennemie, entraîne d'ordinaire cette conséquence; mais qu'on regarde comme une exception à la règle générale l'absence des forces bloquantes occasionnée par le vent, l'état de la mer, on d'autres accidents de navigation, et lorsqu'elle est de très-peu de durée; c'est-à-dire qu'on considère que le blocus n'a pas pour cela cessé d'exister. Cette exception ne saurait toutefois incriminer le neutre, qui à profité de l'absence du bloquant pour franchir l'ancienne ligne de blocus."

* Abdy's Kent, p. 367.

that their action may be effective. In such cases it is reasonably presumed that so much of the Sovereign's authority is delegated to the commander of a distant force as to make a blockade, which he actually institutes and maintains, a legal blockade. This is called a "blockade *de facto*," meaning that it is a blockade *de facto* only, so far as regards notice from Government to Government. In such a case all jurists concur in holding that, before a neutral ship is condemned for breach of blockade, there must be proof that the individual neutral shipmaster had actual notice of the blockade having been established.

Blockade "*de facto*."

608. The French courts have been in the habit of holding that actual notice to the individual shipmaster is always necessary, and that mere constructive notice is insufficient*. Some authorities go so far as to require not only that the individual neutral shipmaster shall have received notice, but that such notice shall be given to the neutral ship on her actual approach to the blockaded port. She is then to receive warning from the blockading squadron. If she obeys that warning and retires, she is not to be molested. If she perseveres in her attempt to pass, or if after being once warned she makes a second attempt, she becomes liable to seizure and condemnation.

Theory of the French courts as to actual notice and warning being always necessary.

609. It is not likely that either England or America will depart from the rule established in their courts as to the validity of constructive notice. It is far more likely that France will in future wars discon-

The doctrine of constructive notice likely to prevail.

* See Sir Travers Twiss, p. 208.

tinue her indulgent system, which must, if maintained, now that steam-navigation has become so general, deprive blockades of nearly all their efficiency. It is obvious that if the swift and speedy "blockade-runner" (as a class of vessels during the late American war was termed) is allowed to approach with impunity the port which is known to be blockaded, and that her commander, if he finds a temporary gap in the line of the blockading ships, or a convenient fog, may put on all steam and dash through, whereas if he finds all points strictly guarded he has only to receive a polite message and to withdraw without damage, breaches of blockade will be almost indefinitely multiplied.

What is a sufficient breach of blockade?

610. The discussion of what is sufficient notice of blockade has been necessarily blended with remarks which apply equally to the topic of what constitutes a breach of blockade, subjecting vessel and cargo, one or both, to seizure and confiscation?

English and American doctrines that inception of voyage with notice is enough.

The English and American courts hold that when sufficient notice of a blockade has been given, whether constructive or otherwise, according to the nature of the case, a vessel which begins a voyage with an intent to break the blockade if possible, has actually put into execution an enterprise which is contrary to the law of nations, and which exposes the vessel to the penalties ordained by that law. If, indeed, the masters of such vessels can clearly prove that during the interval between setting sail and capture they had wholly changed their intention, and had entirely renounced the illegal voyage on which they started, they may be absolved from the penal conse-

quences of their inchoate but abandoned offence. But the burden of proof of such change of plan lies on them; and the proof ought to be very full and trustworthy before the captors can be expected to give effect to it. Of the numerous excuses of Neutrals that are intercepted when proceeding towards a blockaded port, one of the most common is the assertion that their intention was merely to inquire if the port was still under blockade, and to desist from any attempt at entrance if that should prove to be the case. English and American judges have concurred in refusing to listen to such pretexts. In one case Lord Stowell declared that it is "a measure of necessary caution and of preventive legal policy to hold the rule general against the liberty of inquiry at the very mouth of the blockaded port, as such a liberty would amount in practice to an universal license to enter, and, on being prevented, to claim the liberty to go elsewhere"*. In very recent cases that came before the Supreme Court of the United States†, Mr. Justice Field, in giving the judgment of the court, decided that "It is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade; and after notification of a blockade the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal.

Insufficiency of excuse of approach for the purpose of inquiry.

Lord Stowell's judgment.

Recent decisions of the American courts.

"The approach of a vessel to the mouth of a

* The 'Spes' and 'Irene,' see Travers Twiss, p. 213.

† Cases of the 'Admiral,' 3 Wallace, 603, and the 'Cheshire,' same volume, p. 235.

blockaded port for inquiry, the blockade having been generally known, is itself a breach of the blockade.

"If approach for inquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade; the liberty of inquiry would be a license to attempt to enter the blockaded port, and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented. *If information be honestly desired, it must be sought from other quarters.*"

611. It will be seen from what has already been written respecting the French courts requiring express notice and warning to the neutral vessel to be given by the blockading squadron, that these principles of the British and American tribunals are not universally admitted. There are also other authorities which, although they do not require the warning which is directed by the French writers and judges, yet maintain that "a remote intention to violate a legal blockade entertained at the outset of the voyage is not sufficient cause to authorize the seizure of a vessel"*. They assert that the Neutral, in order to become liable to capture, must have shown a clear "and speedy" intention to enter the port. While she is at any considerable distance from it she is free from capture, because there is still a *locus pœnitentiæ*, and it is not certain that she will attempt to complete the breach of blockade*. It is not, however, at all probable that

Opposite doctrine of French Courts.

Other authorities.

* Woolsey, p. 319; Field's Draft Intern. Code, p. 575; Bluntschli, p. 468. sect. 835.

the strict rules, which the courts of England and America have established, will be abandoned or relaxed by either of those great Maritime Powers.

Case of continuous voyages.

612. A more serious difficulty arises as to what are termed "continuous" voyages; that is to say, when the primary purpose and ultimate destination of the shipment in question are the supply of goods to a port which is known to be blockaded, but where the journey thither is purposely divided into stages, and the goods are captured on board of a vessel which was not intended to convey them beyond some neutral and apparently lawful port, their transshipment and ultimate transmission thence to the blockaded place being destined to be effected by other means of conveyance.

Doctrine of "continuous voyages" when articles not necessarily contraband are destined for a blockaded port.

613. This subject has been already adverted to when the law as to contraband was being considered. It will generally be found that where there [redacted] is a shipment intended for the supply of a blockaded place, a considerable portion of the articles shipped are goods contraband of war, such articles being of special value under the circumstances. But this need not always be the case; and it is necessary to deal with the hypothesis of a shipment of goods, the bulk of which are not contraband, and which are destined to be conveyed to some place which is known to be blockaded by a hostile squadron. We will suppose the now common artifice to be resorted to of shipping the goods in a vessel, which is to deposit them at some intermediate neutral place, whence they are to be by other methods forwarded to the place which is blockaded.

614. What is the gist of the offence against International Law, punishable by naval capture, which is committed by the owner who ships them, and (it may be) by their carrier also? It is a design to break the blockade established by the capturing Belligerent, such design having been partly put in act by the inception of the voyage. If this is admitted to be correct, and if it is kept steadily in mind, it will serve to show how far the American courts have been right in their recent extension of the doctrine of "continuous voyages" to cases of breach of blockade and of contraband, and how far they have promulgated, or seemed to promulgate, rules which, if accepted to the full extent, would give an undue and unfair increase to the prerogatives of Belligerents with regard to the commercial liberties of Neutrals.

The offence of blockade-breach impossible, unless a line of blockade is to be actually broken.

615. Where it is reasonably proved that the shipment was made and the voyage commenced with the design that the goods should reach the blockaded port by sea, it seems quite right to hold that there is a liability to capture and condemnation. The doctrine of "continued or continuous voyages," as it is called, is said to have been originated by Lord Stowell, in order to counteract the evasions practised by Neutrals, in the first part of this century, of the International Law which, according to the English interpretation of it, forbids Neutrals to carry on the colonial trade of a Belligerent—a subject which will be spoken of presently. President Woolsey says on this subject (I prefer to quote an American authority) that Neutrals, and especially shippers and captains

Doctrine of continuous voyage sound when there is a design to effect the introduction of the goods by sea.

belonging to the United States, tried to evade the English rule by shipping at a neutral port, and then, after a show of paying duty and of landing and re-landing the cargoes, carrying them on to their destination. "The courts held that, if an original intention could be proved of carrying the goods from the colony to the mother country, the proceedings in the neutral territory, even if they amounted to landing goods and paying duties, could not overcome the evidence of such intention; the voyage was really a continued one artfully interrupted, and the penalties of law had to take effect. Evidence, therefore, of original intention and destination was the turning point in such cases.

"The principle of continued voyages will apply when cases of contraband, attempt to break blockade, &c. come up before courts which accept this English doctrine. In our late war many British vessels went to Nassau, and either landed their cargoes destined for Confederate ports there, to be carried forward in some other vessel, or stopped at that port as a convenient place for a new start towards Charleston or some other harbour. If an intention to enter a blockaded port can be shown, the vessel and the cargo are subject to capture according to English and American doctrine from the time of setting sail. Now the doctrine of continued voyages has been so applied by our Supreme Court that it matters not if the vessel stops at a neutral port, or unlades its cargo and another vessel conveys it onward, or if formalities of consignment to a person at the neutral port, or the payment even of duties are used to cover the transaction; provided destination to the

blockaded port, or, in the case of contraband, to the hostile country, can be established, the ship on any part of its voyage, and the cargo before and after being landed, are held to be liable to confiscation. All this seems a natural extension of the English principle of continued voyages, as at first given out; but there is danger that courts will infer intention on insufficient grounds."

616. This comment of President Woolsey seems to be sensible and fair; and his caution against the Judges of Prize-courts being led by animosity against the enemy, and by the contagious influence of public opinion among their countrymen to infer continuous intention on insufficient grounds, is very necessary, as has been shown by the case of the 'Springbock,' which has already been mentioned in this chapter. We must, however, accept the doctrine of "continuous voyages" in blockade cases with this important limitation: the doctrine of "continuous voyage" must, when we are dealing with cases of blockade, be limited to cases of "voyage" in the strict English sense of the word. It is only by something done at sea that a blockade by sea can be broken; and when the design of the Neutral is to introduce his goods into the blockaded place by land there is no breach of naval blockade in contemplation. But the judgments of the American courts in recent cases, while they resolutely apply the doctrine of "continuous voyage," do not contain or indicate any such qualification. In one instance the theory has been practically upheld, that the continuous taint from illegal ultimate destination is fatal, although the goods are shipped for a

Case of the 'Springbock.'

"Continuous voyage" must not include land carriage.

Perilous extension of the doctrine in some American decisions.

neutral country, whence they are to be conveyed by land. President Woolsey says of this, "A still bolder extension was given to it by our courts in the case of vessels and goods bound to the Rio Grande, the goods being then carried up by lighters to Matamoras. We could not prohibit Neutrals from sending goods to the Mexican side of that river; but if it could be made to appear that the goods were destined for the side belonging to the United States, that was held to be sufficient ground for condemnation of them; although, in order to reach their destination, they would need overland carriage over neutral territory." I apprehend that this extreme advancement of belligerent rights will not receive general acquiescence, or acquire even partial permanency*.

Egress and Ingress in breach of blockade.

617. A blockade is generally intended to prevent any persons or things from either going into or coming from the blockaded place. It is designed to be a stoppage of both ingress and of egress, though it is possible that it may be limited to one of these purposes; but such cases are exceptional. The rules as to breach of blockade by egress are thus summed up by General Halleck:—"As a general rule, the egress

* See on the American decisions as to continuous voyages, the citation from the 'Stephen-Hart' case already made at p. 617, *suprà*. See also Dr. Gessner's Juridical Review of the case of the 'Springbock;' Mr. B. Lawrence's Letter to M. Rolin Jacquemyns of 30th Sept. 1873; Prof. Bernard's 'British Neutrality,' p. 307; Wheaton's Elém. sect. 508, Dana's edition and Dana's note; The 'Bermuda,' 3 Wallace's Reports, 574; The 'Peterhoff,' 5 Wallace, 54; The 'Dashing Wave,' 5 Wallace, 170; Bluntschli, p. 488. paragraph 835. sect. 5.

of a ship during blockade is regarded as a violation of the blockade, and renders her liable in the first instance to seizure; and in order to exempt her from condemnation the most satisfactory proof must be given. . . . . There are a number of cases in which the egress of the neutral vessel, during a blockade, is justified or excused. First, if the ship is proved to have been in the blockaded port when the blockade was laid, she may retire in ballast; for such egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. Second, if the ingress was from physical necessity, arising from stress of weather, and the immediate need of water, or provisions, or repairs. Third, where the entrance with a cargo was authorized by a *license*, such license is construed to authorize the return of the ship with a cargo. Fourth, where a neutral ship, arriving at the entrance of a blockaded port, in ignorance of the blockade, is suffered to pass, there is an implied permission to enter, which fully protects her egress. But this implied permission does not, of necessary consequence, protect the cargo; for its owners may be guilty of a criminal violation of the blockade even where the ship is innocent. Fifth, a neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo that has been found unsaleable, and reshipped during the blockade. Sixth, '*Another* and a very equitable exception,' says Duer, 'is allowed in favour of a neutral ship that leaves the port in the just expectation of a war between her own country and that to which

the blockaded port belongs. In this case she is permitted to depart, even with a cargo purchased from the enemy during the blockade, if the purchase was made with the funds of neutral owners, and the investment and shipment were probably necessary to save the property, in the event of a war, from a seizure and confiscation by the enemy. But it is not the mere apprehension of a remote and possible danger that will entitle a neutral ship to this exemption. To save the vessel and cargo from condemnation, it must appear that there was a well-founded expectation of an immediate war, and, consequently, that the danger of the seizure and confiscation of the property was imminent and pressing' "*.

What amounts to a breach of blockade outwards.

618. With respect to what may amount to a breach of blockade outwards, it is to be remarked that such an offence may be committed by a vessel which does not herself come forth from within the line of blockade. A vessel, which is lying outside the line of blockade, will commit a breach of blockade, if she there takes on board cargo which is brought to her by lighters or other vessels sent out to her from within the line. But where, in the case of a blockade by sea, goods are sent from the port by land conveyance or by inland navigation to a maritime place beyond the line of blockade, and are there taken on board a neutral ship which has stationed herself there for the very purpose of receiving, no breach of blockade is considered by the English courts to have been committed. The

* Halleck, pp. 560, 561.

main case on this subject is that of the 'Stert' *. Lord Stowell, in giving judgment, said, *inter alia*, "This is a question arising out of the blockade of Amsterdam, respecting goods put on board in a port of the Texel for the very purpose of being sent to London without any interruption of the voyage, but conveyed out of Holland to Embden by means of the canal navigation. The question is, whether this is to be considered as a breach of the blockade? A blockade may be of different descriptions. The blockade of Amsterdam, which was imposed on the part of this country, was, from the nature of our situation, a mere maritime blockade effected by force operating only at sea. As far as that force could be applied it was indubitably a good and legal blockade; but as to an interior navigation how was it a blockade at all? . . . It is argued that, if this course of trade is allowed, the object of the blockade, which is to distress the trade of Holland, will be defeated. If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit of an effectual remedy of this species. . . . If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited."

Lord Stowell's judgment in the case of the 'Stert.'

I have quoted this judgment more readily on account of its bearing both on the subject immediately before us and on the matter discussed a few paragraphs

* 4 Robinson's Reports, 65; and see 3 Phillimore, 390.

back, whether there can ever be a lawful seizure and condemnation when no breach of the actual line of blockade is effected or designed.

How long the guilt of breach of blockade continues.

619. The liability to seizure for breach of blockade continues so long as the blockade actually continues; and so long as the offence for which the seizure is made is considered to be continuing. The rule commonly laid down is that the capture must be effected while the vessel is *in delicto*. A vessel which has broken blockade by egress is considered to be *in delicto* until she has reached her port of destination and has completed her voyage. But as soon as a blockade is raised, a vessel ceases to be liable to seizure for breach of blockade, although if already captured she is not to be released*.

Penalty for breach of blockade.

620. The general penalty for breach of blockade is confiscation of both vessel and cargo†. The presumption of law is that the violation of a blockade is intended for the gain of the owners of the cargo, as well as of the owners of the ship, and that it takes place with the sanction of both. Exceptional cases may occur, in which the owners of cargoes may succeed in proving innocency; but the proof which can procure exemption of the cargo from the ordinary consequences of the ship's illegal destination, or of the shipmaster's illegal conduct, must be very full and explicit indeed. Conversely, cases may occur where the cargo is shipped with an illegal purpose of introduction into a blockaded port, but where the shipmaster who conveys it on part of its journey to some

* Abdy's Kent, 47. † Ibid. 52; Travers Twiss, 223.

intermediate neutral port has no knowledge of, and no reasonable grounds for suspecting, its ulterior unlawful destination. In such a case, although the stoppage of both ship and cargo will be regular and proper, the ship may be released and the cargo only condemned after due inquiry by a proper tribunal*.

Consequences of Neutrals engaging in colonial or coasting trade of a Belligerent.

621. During the last century and in the early part of the present century neutral vessels and cargoes were frequently captured by English cruisers, and condemned by English courts for being engaged in the coasting or colonial traffic of a State hostile to England, such coasting or colonial traffic having been confined by that State to its own subjects during peace-time, and having been only opened to foreigners in time of war, after the preponderant force of England at sea had incapacitated such Belligerent from carrying on his coasting and colonial traffic by means of his own marine. The English jurists maintained that for a Neutral thus to interpose and reopen the colonial or coasting traffic of England's enemies, when closed by the warlike operations of the British navy, was a departure from neutrality and an interference in the war, and that, such trade being reserved in the regular course of things by the Belligerent for his own vessels, neutral merchants and shipowners, who took part in that trade, assumed the character of the enemy's subjects, and became liable to suffer accordingly. This has been called "The rule of the war of 1756," although its assertion at earlier periods is

The "Rule of the War of 1756."

* See the case of the 'Springbock.'

demonstrable. But it was in the Seven Years' War (which began in 1756) that the subject was brought prominently into notice. During that war (in which England and France took opposite parts) the superiority of the English naval power was fully established, and the communication between France and her (then considerable) foreign possessions was almost entirely obstructed. Before the war France had not permitted any foreigners to trade with her colonies; but in consequence of the distress thus brought upon those colonies and France herself by the British fleets and cruisers, the French Government permitted a neutral power, the Dutch, to carry on the traffic with the French colonies. The English cruisers captured Dutch ships so engaged, and the English Prize Courts condemned them. The subject created considerable controversy among European jurists; and it acquired additional interest and importance during the long series of hostilities carried on by England against Revolutionary and Imperial France between 1793 and 1815. The United States protested earnestly against the international legality of the Rule; but it was steadily maintained by England, and many of Lord Stowell's most elaborate and able judgments are devoted to its justification. Nor were there wanting American authorities that foreboded that "if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate, and which shall prove sufficient to render it expedient for their maritime enemy to open all his domestic trade to en-

terprising Neutrals, we might be induced to feel more sensibly than we have hitherto done the right of the policy and equity of the rule"*. The truth of this prophecy has been abundantly manifested by the recent decisions of the United States Courts in the 'Stephen Hart' and the other cases on which we have just been commenting.

Doubtful whether Free Trade has entirely put an end to the importance of questions arising out of the Colonial System.

622. It has appeared to some writers that the subject of neutral vessels becoming liable to seizure for engaging in the colonial and coasting trade of a Belligerent has become unimportant in consequence of the advance made by the doctrines of Free Trade. Mr. Godfrey Lushington, in his preface to the Manual of Prize-Law, issued by direction of the British Admiralty, says that, "The liability of neutral vessels to detention for carying on the coasting or colonial trade of the enemy, may be taken to have been silently repealed by the advance of free trade. * * * The restriction was natural enough in times when, during peace, each country reserved such trade as the exclusive privilege of its subjects; for then, if in time of war Neutrals were found to be carrying on such privileged trade, the presumption was that the enemy, finding it impossible on account of the belligerent cruisers to carry on the trade any longer for himself under his own flag, had deputed it to Neutrals to carry on for him. But now, wherever free trade prevails in times of peace, this reasoning no longer holds

* Abdy's Kent, p. 229. Attempts have been made to draw distinctions between "the rule of 1856" and the doctrines of Lord Stowell; but it seems now immaterial to discuss them.

good; and the prohibition to Neutrals to carry on the coasting or colonial trade of the enemy will probably never be revived, even if England were to be engaged in war with any country which had not yet allowed free trade to its colonies, or which still maintained Navigation Laws" *.

It may, however, be reasonably doubted whether equal liberality will be shown by other nations. Some may be disposed to adopt the old English theories as to continuous voyages, without also adopting the modern English principles and practice respecting Free Trade.

Claims of some belligerents to seize enemy-goods in neutral vessels; claims of others to seize neutral's goods in enemy-vessels. Neutral's claim of "Free ships free goods."

623. Some of the most frequent and most formidable controversies between Belligerents and Neutrals used to arise from the claims made by some nations to seize an enemy's goods if found at sea, although on board of a neutral vessel, and from the claims made by other nations to seize a neutral's goods if found at sea on board of an enemy-vessel. Against the first of these claims Neutrals used to assert the maxim that "Free ships make free goods." Sometimes they admitted at the same time the converse maxim, "Enemy-ships make enemy-goods;" but more frequently it was found convenient in the interest of Neutrals to deny the legality of both causes of seizure.

These controversies not absolutely settled by the Declaration of Paris of 1856.

624. The Declaration as to Maritime Rights which accompanied the Treaty of Paris in 1856, is regarded by many persons as having once for all settled these disputes in favour of Neutrals; so that in future wars neutral ships will be allowed to carry enemy-goods (if not contraband with a hostile destination,

* Page xi.

and if not shipped for the purpose of violating the laws of blockade), and neutral goods will not be liable to confiscation for being shipped in vessels of a Belligerent. But it is by no means certain that the Declaration of Paris has fully or irrevocably settled the matter; and it was a matter so important and so much debated for so long a time, that it cannot be passed over without some narrative and explanation.

Ancient Law of the Sea made enemy-goods liable on board of any ship on the high seas.

625. The ancient treatise on maritime rights and usages, called "Consolato del Mare," shows clearly (as do other old authorities) that the maritime powers of the Middle Ages acted generally on the rule that a belligerent State has the right to take possession of enemy's property found on the high seas, the high seas being "*nullius territorium*," and consequently no wrong to the territorial sovereignty of any third State being wrought by such seizure and appropriation*. The fact that such goods were being conveyed in a ship which belonged to persons not members of the hostile State was not considered to give protection to the goods. The ownership of the goods themselves gave the test of their liability or non-liability to forfeiture; and on this same principle, when a belligerent's cruiser captured an enemy's ship having on board of it goods belonging to a merchant of some nation not engaged in the war, it was usual to give up such goods to their owner.

Ownership of the goods the test of their liability. On same principle a friend's goods found on board an enemy-ship were restored.

General and long recognition of liability of enemy's goods on board of neutral ship.

626. The first branch of this rule, that which subjected to capture enemy's goods on board of neutral

* See Sir Travers Twiss, p. 144; Wheaton, 'Histoire,' tom. i. 69; Sheldon Amos, Manning, 3 Phillimore, p. 240; and see *suprà*, 539.

ships, was recognized by the early modern writers on International Law, and continued to be acknowledged and to be enforced in practice (save when modified as between particular States by special treaties) until the middle of the last century. In 1752 the Prussian Government affected to treat as a grievance the taking of French goods out of Prussian vessels by British cruisers in a war between England and France. This and other pretensions of the Prussian King were answered by the British jurists employed by the Government of this country in that masterly memorial so often referred to in this volume. In 1759 the maxim of "Free ships free goods" was for the first time advocated by a European jurist of high reputation, by Hübner, from whom all subsequent writers on the same side have borrowed the greater part of their arguments. But Vattel's great work on the Law of Nations appeared about the same time; and that almost paramount authority decisively recorded his judgment that "If we find enemy's effects on board a neutral ship we seize them by the right of war." Many others wrote on the same subject, the vast preponderance of authority and of reason being on the side of the ancient doctrine and opposed to the Hübnerian paradox.

First opposition by Prussian Government in 1752.

British memorial supporting the right.

Hübner's advocacy of "Free ships free goods." Preponderant authority of Vattel and others *contrà*.

627. But this new doctrine was taken up towards the end of the century by the Empress Catherine of Russia. She issued in 1780 a manifesto* of Neutral

The Hübnerian paradox taken up by the Russian Empress Catherine.

* For the mode in which Count Panini induced Catherine to adopt the project of the "Armed Neutrality," see Wheaton, 'Histoire du Droit des Gens,' tome i. p. 358, and 3 Phillimore, p. 272.

Rights, in which several other Powers concurred. One article of it required that the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband. England (then engaged in the American war) firmly resisted this demand; but with the conclusion of that war in 1783, the subject lost for a time its practical importance. But during the subsequent war between England and France, Russia revived the doctrines of the armed neutrality, to which Sweden, Denmark, and Prussia then gave in their adhesion. England again resolutely and successfully resisted this innovation on a belligerent's maritime rights; nor was the doctrine of "Free ships free goods" ever admitted into the general international jurisprudence of Europe before the Declaration of Paris at the close of the Crimean war.

The "Armed Neutrality."

The Baltic Confederation.

Steadily and successfully resisted by Britain.

628. The Government of the United States, under its earliest and best statesmen, fully admitted the soundness of the principles of the old Maritime Law as maintained by England; and the great judges and publicists of the United States have adhered to them with honourable consistency, though frequently expressing a wish that the new doctrine could be introduced by general consent. One quotation from Chancellor Kent on this subject will be sufficient. "During the whole course of the wars growing out of the French Revolution the Government of the United States admitted the English rule to be valid, as the true and settled doctrine of International Law—that enemy-property was liable to seizure on board

The United States maintain the old law of the sea, though expressing a wish for the proposed change.

Decisive authority of Chancellor Kent as to the validity of the English doctrine.

neutral ships, and to be confiscated as prize of war "*.

Second branch of the old rule, which protected neutral goods on board of enemy-ships, rejected by France and Spain. They establish contrary maxim, that "the ship taints the goods." France, however, long adhered to the old law, that enemy-goods may be seized in any ship.

629. With regard to the other branch of the ancient rule, that namely which enjoins the restoration to the neutral owner of his goods if found at sea by a belligerent on board an enemy-ship, it was abandoned by France in the seventeenth century; but France did not then nor for a very long time afterwards seek to establish the full maxim that the character of the flag determines the character of the goods. Not to mention some earlier edicts on the subject, the French Government in 1678, by their Ordonnance de la Marine, declared that neutral's goods on board of enemy-ships should be confiscated, and at the same time affirmed the law that enemy's goods on board of neutral ships were similarly liable. The French then, by way of additional penalty, ordained that the carriage of such goods rendered the neutral ship herself subject to confiscation. The phrase was, that "the cargo tainted the vessel." Without tracing all the varied and somewhat obscure phases of French law on the subject, it will be enough to state that during the greater part of the present century, and down to the beginning of the Crimean war, the French tribunals had adopted and established the principles that enemy's goods on board of neutral ships were not to be seized, but that a neutral ship which carried enemy's goods made herself thereby liable to seizure

Final state of French Maritime Law on the subject before the Crimean war.

* Abdy's Kent, p. 341. The leading case in the recorded jurisprudence of America on the subject is The 'Néréide,' 9 Cranch, 388.

and forfeiture. Spain followed the doctrines of France*.

630. England in this branch also of maritime law adhered to the old rule, as did the United States. Both those great maritime powers steadily asserted and acted on the principle that when an enemy's ship was captured having goods on board which were clearly proved to be the property of a neutral, such goods ought to be restored to their neutral owner.

England and the United States maintain the ancient law as to restoring a friend's goods.

631. When the war against Russia began in 1854, in which England and France were allies, and had to carry on maritime operations in concert with each other, the two great confederates found that each had a code of maritime laws directly opposed to that of the other on the very important subject of naval captures. As Sir R. Phillimore has said, "The result was a compromise. France abandoned her doctrine that *enemy's ships made enemy's goods*; England agreed to allow, during her alliance with France in the [then] present war, the doctrine that '*Free ships make free goods.*' But they scrupulously and expressly declared in doing so she '*waived a part of the belligerent rights appertaining to her by the Law of Nations*' "†.

Effect of maritime cooperation of France and England in the Crimean war.

Each Power waives the enforcement of some of what it deems its maritime rights during the war.

632. England thus, during the Crimean war, retained in theory though omitting in practice her ancient belligerent right on this important subject. But at the close of the war she became party to a renunciation of that right without reserve or protest.

* Wheaton, 'Histoire,' tom. i. pp. 261, 273, 357, 358, 363; tom. ii. p. 47. 3 Phillimore, chap. x.; Manning, chap. vi.; Halleck, p. 631.

† Vol. iii. p. 293.

More important renunciation of those rights at the end of the war. This renunciation may not be final and conclusive.

Congress of Plenipotentiaries at Paris in 1856. Treaty of Paris prepared and signed by them. They afterwards hold conferences embracing general maritime law.

That renunciation was effected in a somewhat anomalous manner; and there is still considerable diversity of opinion among Englishmen as to the extent to which that renunciation is binding upon England either legally or morally. The Plenipotentiaries, who were respectively appointed by England, France, Russia, Turkey, and Sardinia (the belligerents in the Crimean war), and also by Austria and Prussia (which took part in the negotiations for peace), to frame articles on which a Treaty of Peace should be concluded, drew up, signed, and sealed the Treaty of Paris (afterwards duly ratified by the Sovereign Powers) on the 30th of March, 1856*. The Plenipotentiaries continued to meet from time to time in conference at Paris; and among the subjects discussed by them was the state of Maritime Law†. On the 16th of April they drew up and signed the Manifesto which we are now considering, commonly called "The Declaration of Paris," the text of which I shall quote, as almost every word of it is important. It will be found in Hertzlett's second volume‡. It is as follows:—

They draw up "The Declaration of Paris."

"The Plenipotentiaries who signed the Treaty of Paris of the 30th of March, 1856, assembled in Conference,

"Considering:—

"That Maritime Law in time of war has long been the subject of deplorable disputes;

"That the uncertainty of the law and of the duties in such a matter gives rise to differences of opinion between neutrals and

* See Hertzlett's 'Map of Europe by Treaty,' vol. ii. p. 1250.

† See list of these conferences and their subjects in Hertzlett, vol. ii. p. 1276.

‡ P. 1282.

belligerents which may occasion serious difficulties, and even conflicts; that it is consequently advantageous to establish a uniform doctrine on so important a point;

"That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect.

"The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and having come to an agreement, have adopted the following solemn declaration:—

"1. Privateering is and remains abolished;

"2. The neutral flag covers enemy's goods, with the exception of contraband of war;

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

"4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"The Governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

"Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof will be crowned with full success.

"The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

"Done at Paris, the sixteenth of April, one thousand eight hundred and fifty-six.

(Signed)	"Buol-Schauenstein.	Hatzfeldt.
	Hübner.	Orloff.
	Walewski.	Brunnow.
	Bourqueney.	Cavour.
	Clarendon.	De Villa Marina.
	Cowley.	Aali.
	Manteuffel.	Mehemmed Djemil."

Other States invited to accede to the new laws.

633. The Governments of other civilized nations (not represented at the Congress of Paris) were invited by the English and French Governments to accede to this Declaration. Upwards of forty European and American States declared their accessions. No considerable nation of Europe refused to do so, excepting the Spanish; and Spain professed her willingness to adopt all the articles of the Manifesto, save that which abolished privateering. Mexico followed Spain. These States, therefore, stand aloof from the compact. But a far more serious blow to the expected establishment of the new system of Maritime Law was given by the refusal of the great Commonweath of the United States of America to join in the Paris Declaration, unless the very important addition were made to its articles of declaring all private property, including that of the subjects or citizens of belligerents, to be exempt from seizure in maritime warfare, except articles that are contraband of war.

Number of affirmatives.

Spain and Mexico are dissentient.

Important dissent of the United States.

Doubts as to the policy of England's participation in this compact, and as to its validity.

634. The policy of England in becoming a party to the Declaration of Paris, which purports to abolish one of the most highly valued rights of a belligerent Power which is specially strong at sea, has been called in question by many politicians; and many have doubted how far that Declaration is binding upon her, being no part of a formal treaty, and not having been prepared or executed by representatives especially appointed for such a purpose, but set forth in a document prepared after the execution of the Treaty of Peace, by which the war was terminated, and having

no natural connexion with the objects of the Treaty itself *.

635. The policy of England's joinder in the Declaration of Paris, and the propriety of her permanent adherence to it, have been more than once brought into question in the British Imperial Parliament. The Ministries in office at the times of these debates have been sanctioned by both Houses in declining to renounce the compact, which England is considered to have made or ratified with the other signatories of the Declaration when due regard is paid to the fact of so many other powers having acceded to it on her invitation.

England's adherence to the Declaration of Paris questioned.

Ratifying effect of her inducing other Powers to accede to it.

It seems to be generally considered that it is open to England to renounce the Declaration, on giving ample notice of her intention to do so to all Powers interested in the subject; but that, as a matter of expediency, it has not become advisable for her to recede from it. These questions are so inevitably blended with political contests of the present time, that I avoid their further discussion. I will only observe that every successive year, during which England allows the Declaration of Paris to stand as the acknowledged record of the law which she is pledged to follow respecting maritime rights of capture, will make it more and more difficult for her to revert to her ancient belligerent practice on the high seas, should circumstances make such a reaction on her part desirable†.

It is perhaps open to her to renounce on due notice.

Expediency of such a step to be well considered.

* See preface to Sir A. Phillimore's 3rd volume, p. x.

† The most interesting debate in Parliament on this subject was brought on by Mr. Baillie Cochrane's motion re-

Rights of Visitation and Search.

636. So long as belligerents retain the right of seizing neutral vessels or cargoes on the high seas for any cause whatever (and no one has yet seriously proposed to abolish that right in cases of conveyance of contraband, or of breach of blockade), the ancillary right must continue of Visitation and Search. The law on these subjects is thus accurately summed up by

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specting the Declaration of Paris on April 13, 1875. The report of it will be found in Hansard, ccxxiii. p. 826. In support of the motion censuring the Declaration, and urging our withdrawal from it, it was argued the signatories of the Declaration on the part of England acted without due authority; that they and the other ambassadors, who were sent by their respective Governments to Paris in February 1856, were empowered to prepare a Treaty of Peace, which was accordingly prepared and signed on the 30th day of March in that year; that when they continued to meet afterwards and discuss other matters not necessarily connected with the Pacification, they were mere volunteers and private persons; that the Declaration, which they drew up and signed as to maritime rights, was (so far at least as England was concerned) never ratified by the Sovereign Power; that those who acceded to it did so in the expectation and on the faith that it would be universally, or almost universally accepted, whereas the refusal of the United States to join in it deprived it of the character of general international law; that England had become especially free to renounce it, after Russia's renunciation of the terms of the Treaty respecting the neutralization of the Black Sea; that the policy of abandoning the right of seizing neutral goods in enemy's ships was pernicious to English interests, and opposed to the doctrine which had always been earnestly maintained by England's highest statesmen, jurists, and naval commanders of all political parties. The motion was opposed as "inopportune." It was urged that even if the engagement had been entered into without all customary formalities, it was virtually binding upon England, especially after she had induced so many other States to become parties to it. It was argued also that

Mr. Polson :—"The right of visiting and searching merchant-ships upon the high seas, whatever their cargo and whatever their destination, for the purpose of seeing what the ships and their destination are, and whether or not they are employed in the enemy's service ('Le Louis,' 2 Dods. 244–253), is an incontestable right of the lawfully commissioned cruisers of a belligerent State; nor can even the command of a neutral Sovereign justify his subjects in forcibly resisting its exercise (The 'Maria,' 1 Rob. 360). Such resistance is punishable by the condemnation of the ship (The 'St. Juan Baptista' and 'La Purissima Concepcion,' 5 Rob. 33) and cargo; and a simple intention to resist will involve the same consequences (The 'Maria,' *ut cit.*); but such an intention will not be presumed from a mere attempt to escape a cruiser before possession has been taken (The 'St. Juan')"*. Polson's summary of the Law.

the fact of the highest British authorities, the Sovereign and the Imperial Parliament having refused to repudiate it, though frequently made the subject of public debate, amounted to a sanction and to a sufficient ratification of an act which purported to have been done by British plenipotentiaries having competent authority.

The question was again debated during the present year, 1876. The attempts to procure Parliamentary repudiation or censure of the Treaty were again unsuccessful. It was urged that England's formal resumption of old war-rights would be construed as showing her intention to join in the general war which appeared to be imminent.

* Polson, p. 50. For the mode in which the rights of Visitation and Search should be exercised, so as to secure the rights of the belligerent with the least possible inconvenience to the neutral, and for the liabilities of the commander of a war-ship, if he abuses those rights, or detains either ship or cargo vexatiously, or without reasonable and probable cause, see the British Admiralty Manual, so often referred to in this treatise.

Recognition by Neutrals of new States in cases of armed Secession, Revolt, and Civil war.

637. Many widespread wars have arisen, and many permanent heart-burnings between nations have been created in consequence of civil dissensions that have broken out in a single State, and of revolts of portions of a single State against the old central sovereignty. Foreign nations cannot avoid being affected by such events. Their subjects must often necessarily have dealings with the members of the revolutionary or insurgent party in the disturbed State; and in the case of maritime nations, the complications as to jural rights and liabilities caused by such intercourse, or by acts of violence committed by armed partizans and armed ships, become more and numerous and embarrassing. If the conflict among the opposite parties in the disturbed State is brief, and especially if the old government speedily reestablishes its authority, the difficulty imposed on foreign nations is trifling. They have but to wait a little; and some degree of inactive patience on their part is always proper. But if the conflict assumes formidable proportions and lasts long, if it becomes Civil War and not mere local tumult, the duty of other States towards their own subjects (to pass by other reasons) requires the rulers of those other States to pursue a different line of conduct. It by no means follows that they are at once to treat the revolting party as an Independent State. While the conflict continues, and the old government has any reasonable chance of reorganizing its sway, this ought not be done; but when the conflict is a civil war, each party to it becomes in fact a belligerent, and is to be regarded by

Neutrals inevitably affected by such occurrences.

Belligerent rights may be allowed before independence is recognized.

Foreign States as entitled to belligerent rights and as under belligerent liabilities. Hence there arises a division of the duties of neutrals in cases of armed dissension breaking out in a friendly State. We must consider the neutral's duties—

1st. As to Recognition of Belligerency;

2nd. As to Recognition of Independence.

638. With respect to the rights and duties of Neutrals as to acknowledging the belligerent *status* of an insurgent, or a seceding, or a revolutionary party, the exposition given by the American jurist, Mr. Dana, is so sensible and clear that I gladly adopt it, following the example of Sir Alexander Cockburn, who cites it (with several corroborative authorities to the same effect) in his judgment delivered in the 'Alabama' arbitration. Mr. Dana's words* are as follows:—

Dana's exposition of duty of foreign States as to recognizing belligerent *status*.

"The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign State. The reason which requires and alone can justify this step by the Government of another country, is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent Government is seeking to subdue an insurrection by municipal forces, and the insurgents claim a political nationality and belligerent rights, which the parent Government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a

* In note to section 23 of his edition of Wheaton's 'Elements,' see Blue Book (North America), No. 2, 1873, p. 75.

gratuitous demonstration of moral support to that rebellion, and of censure upon the parent Government. But the situation of a foreign State with reference to the contest, and the condition of affairs between the contending parties, may be such as to justify this act. It is important therefore to determine what state of affairs and what relations of the foreign State justify the recognition.

"It is certain that the state of things between the parent State and insurgents must amount in fact to a *war* in the international sense of the word; that is, powers and rights of war must be in actual exercise: otherwise the recognition is falsified; for the recognition is of a fact. The tests to determine the question are various, and far more decisive where there is a maritime war and commercial relations with foreigners. Among the tests are the existence of a *de facto* political organization of the insurgents sufficient in character, regulation, and resources to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State, the actual employment of military forces on each side acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent State as prisoners of war—and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent Government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the con-

dition of things is undoubtedly war; and it may be war before they are all ripened into activity.

"As to the relation of the foreign State to the contest, if it is solely on land, and the foreign State is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights in an insurgent community at the centre of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign State must decide whether to hold the parent State responsible for acts done by the insurgents, or to deal with the insurgents as a *de facto* Government. (Mr. Canning to Lord Granville on the Greek war, June 22, 1826.) If the foreign State recognizes belligerency in the insurgents, it releases the parent State from responsibility for whatever may be done by the insurgents, or not done by the parent State where the insurgent power extends. (Mr. Adams to Mr. Seward, June 11, 1861, Dip. Corr. 105.) In a contest wholly upon land, a contiguous State may be obliged to make the decision whether or not to regard it as a war; but, in practice, this has not been done by a general and prospective declaration, but by actual treatment of cases as they arise. Where the insurgents and the parent State are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea,

then the relations of the foreign State to this contest are far different.

"In such a state of things the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers on both sides may stop, search, and capture the foreign merchant vessel; and that vessel must make no resistance, and must submit to adjudication by a Prize Court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant-vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. If it is war, the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but if it is not a war, foreign nations having large commercial intercourse with the country will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruisers are pirates, and may be

treated as such. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons come into play. If it is not a war they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while, if it is not a war, they do not come into that category but under the category of piracy or of crimes by municipal law.

"Now, all citizens of a foreign State, and all its executive officers and judicial magistrates, look to the Political Department of their Government to prescribe the rule of their conduct, in all their possible relations with the parties to the contest. This rule is prescribed in the best and most intelligible manner for all possible contingencies by the simple declaration, that the contest is, or is not, to be treated as war. If the state of things requires the decision, it must be made by the Political Department of the Government. It is not fit that cases should be left to be decided as they may arise, by private citizens, or naval or judicial officers, at home or abroad, by sea or land. It is therefore the custom of nations for the Political Department of a foreign State to make the decision. It owes it to its own citizens, to the contending parties, and to the peace of the world, to make that decision seasonably. If it issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complexity, it is a gratuitous and unfriendly act. If the parent Government complain of it, the complaint must be made upon one of these grounds. To decide

whether the recognition was uncalled for or premature, requires something more than a consideration of proximate facts, and the overt and formal acts of the contending parties. The foreign State is bound and entitled to consider the preceding history of the parties, the magnitude and completeness of the political and military organizations and preparations on each side, the probable extent of the conflict by sea and land, the probable extent and rapidity of its development, and, above all, the probability that its own merchant-vessels, naval officers, and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is, that the foriegn State may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent Sate. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against every thing but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi political recognition. On the other hand, the parent Government is relieved from responsibility for acts done in the insurgents' territory; its blockade of its own ports is

respected; and it acquires a right to exert against neutral commerce all the powers of a party to a maritime war"*.

Greater difficulty of the question when the Independence of a New State should be recognized.

639. The question of when it is proper for foreign States to recognize the independence of a new Sovereign State, which comes into existence by the disruption of an old Sovereign State, is of a much graver character. To acknowledge a *status* of belligerency is merely to acknowledge a fact †. But a great advance must be made, in order to recognize as sole Sovereign over itself *de jure* as well as *de facto* a community whose previous condition has been that of dependency, or connexion, or of partial amalgamation. To take this last step is to create by cooptation a new member of the family of civilized States; and to decree the curtailment of the dominion of the old Power, from which the new one has torn itself away ‡.

* See *suprà*, p. 105, *et seq.* and notes, as to the recognition of a Revolutionary Government and the general principle that International Law recognizes all rulers *de facto*, with the qualification that no moral approbation of the means, whereby their rule has been acquired, is implied by such recognition. See note at p. 107, as to the eagerness with which recognition is always sought by the new party, and as anxiously deprecated by the old authorities.

† See Mr. Lawrence's note on Wheaton, cited in Abdy's Kent, p. 105

‡ It seems hardly necessary to premise that what is written and cited in the text as to Recognition, applies only to cases where the old State refuses to recognize the independence of the New. Where such consent is given, there is no possible difficulty as to the conduct which foreign States are free to follow. But it has been thought proper by very high authorities to point out the different meanings which may be attached to the word recog-

Sound rules on this subject laid down in the discussions by British statesmen as to recognizing the new South-American States fifty years ago, and lately as to recognizing the Seceding States during the civil war in America.

640. This naturally difficult subject has been to a very great degree elucidated, and sound practical as well as theoretical rules respecting it may be considered to have been established by English statesmen, on two great occasions during the present century. The first of these was the discussion in the English Parliament of the propriety of recognizing the Independence of the late Spanish colonies in Southern and Central America; the second occurred when a desire was expressed by some of our political writers and speakers of the time to recognize as independent the Confederate Southern States during the late civil war in America. It is especially in the speeches of Sir

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nition; and I therefore quote (from Sir R. Phillimore's 2nd volume, p. 16) the follow passage in Mr. Canning's speech as to England's recognition of the late Spanish colonies as Independent States:—"It is perfectly true, as has been mentioned, that the term 'recognition' has been much abused; and, unfortunately, that abuse has, perhaps, been supported by some authority: it has clearly two senses, in which it is to be differently understood. If the colonies say to the mother country, 'We assert our independence,' and the mother country answers, 'I admit it,' that is recognition in one sense. If the colonies say to another State, 'We are independent,' and that other State replies, 'I allow that you are so,' that is recognition in another sense of the term. That other State simply acknowledges the fact, or rather its opinion of the fact; but she confers nothing, unless, under particular circumstances, she may be considered as conferring a favour. Therefore it is one question whether the recognition of the independence of the colonies shall take place, Spain being a party to such recognition, and another question whether, Spain withholding what no power on earth can necessarily extort, by fire, sword, or conquest, if she maintain silence without a positive refusal, other countries should acknowledge that independence."

James Mackintosh and Lord Lansdown on the first of these occasions, and in the speeches of the Earl of Derby on the second, that stores of sound international jurisprudence on this matter may be found. Dr. Abdy's edition of Kent's Commentaries, Sir William Harcourt's letters under the title of "Historicus," and Sir Robert Phillimore's treatise on International Law add clear and copious arguments in support of them. The last-mentioned writer thus sums up the result of the discussions. "Speaking generally, two facts should concur before this grave step [that of recognizing the new State against the wish of the old State be taken]:—

Requisites for the propriety of recognition.

"1. The practical cessation of hostilities on the part of the old State, which may long precede the theoretical renunciation of her rights over the revolted member of her former dominion.

"2. There should occur the consolidation of the new State, so far at least as to be in a condition of maintaining international relations with other countries, an absolute *bonâ fide* possession of independence as a separate kingdom, not the enjoyment of perfect and undisturbed internal tranquillity—a test too severe for many of the oldest kingdoms. But there should be the existence of a Government, acknowledged by the people over whom it is set, and ready and able to prove its responsibility for their conduct when they come in contact with other nations"*.

Principles on which these rules are founded.

641. Sir William Harcourt has ably pointed out the principle which is the foundation of the first of these

* 2 Phillimore, p. 19.

canons, of the rule which mainly secures the payment of due regard by foreign nations to the just rights of old Sovereign States in cases of civil dissension. Sir William says, "The general principle which underlies and forms the *substratum* of the whole discussion is the fundamental doctrine of the respect exacted by International Law for the independence of Sovereign States. Each State is bound in its international relations to observe and respect the sovereignty, however symbolized, of every other State. Sovereignty, by the very definition of the term, implies a right to the obedience of subjects, whether the Sovereign be a despot, a monarch, or a republic. As long as persons once owning the relation of subjects to a Sovereign State are still capable of being regarded in any sense as such subjects, to deal with them upon an independent footing is a hostile act towards that Sovereign, which, according to the principles of International Law, may be justly resented. On the other hand, if persons who once owned the relation of subjects have been able, either by force of arms or otherwise, to divest themselves, in a final and permanent manner, of the *status* of subjects, then diplomatic transactions with such persons afford no justifiable ground of offence to their former Sovereign, nor can they be regarded as a breach of neutrality or friendship"*.

The premature recognition of the new State is a violation of the old Sovereign State's right to Independence, and also of its rights of Security, Ownership, and Empire.

It may be added, that to treat prematurely any portion of the territory or of the population of an old State as no longer appertaining to its former Sove-

* Letters of Historicus, p. 2. See the remarks on them by President Woolsey, 'International Law,' p. 435.

reign is to violate not only the old Sovereign State's right to independence, but other primary rights also, which have been described in a preceding chapter of this treatise. Such are the old State's right to security, right of ownership, and right of empire*.

Requisite for fitness of new State for complete recognition—Settled Government.

642. The second condition precedent, mentioned by Sir R. Phillimore for a new State's title to recognition by foreign Powers, is the possession of it by a reasonably effective and permanent system of self-government. This is a matter as to which a foreign State has to consider, not so much its special duties towards the old Sovereign State, as its duties towards the Commonwealth of civilized nations in general. It has been pointed out in an early portion of this volume†, that a State, in order to be entitled to take its place in the great family of Sovereign political societies, must not only be free from government from without, but that it must govern itself. The sense and necessity of this rule are too obvious to require any comment.

Only the Sovereign Power in a foreign State can effectively recognize a new State.

643. Finally, it is to be observed, that the recognition of a new State by a foreign State can be effectively made by the Sovereign authority only in the foreign State; and until such recognition by the Government takes place, private individuals, executive officers, and courts of justice in the foreign State are bound to act and to decide as if the ancient relations between the now dissevered portions of the old State remained unimpeached and binding‡.

* See *suprà*, p. 148 *et seq.* † See *suprà*, p. 97.

‡ 2 Phill. p. 25; Abdy's Kent, p. 87; Halleck, p. 75.

EPILEGOMENA.

No. I.

On the Privileges of Public Ships in Foreign Ports, and on sheltering Fugitive Slaves.

Since the parts of this work which treat of the subjects of Exterritoriality and Slavery passed through the press, some very important State Papers regarding those topics have been issued by the British Government; and opinions on them have been officially delivered by Royal Commissioners of very high eminence as statesmen, judges, and jurists. I refer to the Admiralty Circular Orders as to the reception of fugitive slaves, which were published on the respective dates of July 31, 1875, December 5, 1875, and August 10, 1876*. I refer also to the Report of the Commissioners

* As the last-mentioned of these is now in force to the supersession of all previous instructions, I copy here its operative clauses:—

"1. In any case in which you have received a fugitive slave into your ship and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you *will not admit or entertain any demand made upon you for his surrender on the ground of slavery.*

"2. It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity; and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a State in which slavery exists; but in the latter case you ought, at the same time, to avoid conduct which may appear to be in breach of international comity and good faith.

"3. If any person within territorial waters claims your protection on the ground that he is kept in slavery contrary to treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British consular authority; and you should be guided in your subsequent proceedings by the result."

(dated May 30, 1876), and to the documents accompanying it in the Parliamentary Blue Book, especially to the statements of opinion by Sir R. Phillimore, Mr. M. Bernard, and Sir H. S. Maine, and the Memoranda by the Lord Chief Justice, by Mr. Fitz-James Stephen, and Mr. H. C. Rothery. The minutes of the evidence taken before the Commission are very interesting and valuable, especially as regards the evidence of Sir Bartle Frere and Lieut. Cameron. The same may be said of many of the papers now published in the Appendix, particularly of "the reports from her Britannic Majesty's representatives abroad as to the law and practice of foreign countries with reference to fugitive slaves, and as to the states of slavery in countries still holding slaves"*.

While I feel that it is my duty both towards my readers and myself to make some comments on these publications, I consider that it is not obligatory on me (and that it would therefore be indecorous) to enter into systematic and detailed criticisms. The special portions, which require observation here, are the doctrines which some of the eminent members of the Royal Commission have advanced as to the liability of ships of war when lying in foreign ports to be treated as entirely subject to the jurisdiction of the local authorities in all matters, excepting those immediately connected with the discipline of the crews. According to the opinions now propounded, the processes of the local tribunals may be executed on board of a British man-of-war in foreign territorial waters; persons who are on board of her may be forcibly dragged thence by the local officials; the will and the authority of the officer in command of Her Majesty's ship are to be no more regarded than would be the wishes and remonstrances of the master of a collier, or of the patron of a Levantine fishing-smack. These propositions, to say the least of them, are much at variance with what has hitherto been generally believed to be law on this subject; but the high names, which are attached to the avowal of them, require for them respectful consideration, notwithstanding their seemingly paradoxical character.

I propose, therefore, to make here some observations in addition to what has been written in the eighth chapter of this book†, on

* I also wish to refer to a very valuable paper in the last February number of the 'Law Review,' by Sir Travers Twiss, on "The Exterritoriality of Public Ships of War in Foreign Waters."

† *Suprà*, pp. 76–195.

the privileges of exemption from the jurisdiction of local authorities, which by the custom and law of nations are accorded to the public ships of a Sovereign State when lying in the ports or other territorial waters of a foreign State. I shall proceed to make some comments on England's duties, legal and moral, as to fugitive slaves who obtain refuge on board of our ships of war in such localities; and on the best interpretation of the late Admiralty Circular to Her Majesty's naval officers in command of such vessels.

It will be convenient to state at once the two opposite doctrines as to the jurisdiction to which ships of war are amenable. I will give the doctrine, which limits most of their privileges, in the very words of the member of the Commission who has expounded and maintained that doctrine in a very elaborate and learned paper annexed to the Report*. He sums up his arguments as follows:— "It appears to me, first, that whether 'by comity of nations,' or on the principle of 'implied assent,' or by whatever other name we are pleased to call it, a ship of war, its officers, crew, and all belonging to it, are, when they are within foreign territorial waters, exempt from the local jurisdiction in all matters relating to the management and discipline of the ship, and the relation of the officers and crew to one another, *but that this exception goes no further*"†.

The other doctrine, and that which I venture to consider the true one, may be, I think, best summarized in the following, or some equivalent manner:—

By the usage of nations the public ships of Sovereign States do not, like private vessels, on entering the territorial waters of a foreign State become subject while there to the jurisdiction of the local laws and officials: no person except a duly authorized agent of the State to which a public ship belongs has a right to enter a public ship, or to execute any process, or to exercise any force or authority on board of her, unless by permission of her commander,

* See in Blue Book, pp. lxii–lxxxv, "An examination of the authorities cited by 'Historicus,' as to the exemption of a ship of war from the local jurisdiction when she is in foreign territorial waters; with an inquiry into the nature and extent of that exception. By Mr. H. C. Rothery," &c.

† Blue Book, p. lxxxv. The italics are mine.

who is responsible to his own sovereign, and not to any foreign power for the orders given there*.

I have avoided the use of the term "Exterritoriality," which is very commonly employed to denote the *status* of a war-ship in a foreign port. It is a mere metaphor, convenient in some respects for popular talk on account of its expressive quaintness, but extremely inconvenient for accurate and rigid argumentation, on account of its exaggeration and looseness. I thoroughly concur with Sir William Harcourt in deprecating the use of metaphors in legal reasoning. He has pointed out the mischief caused by the introduction and abuse of the word "territoriality" with regard to merchant-vessels, and the "vicious and false analogy" by which that metaphor has been by some writers made an instrument for "converting the neutral vessel into an integral portion of the neutral territory"†. The metaphor of "Exterritoriality," as applied to the war-ship in foreign waters, is capable of being equally perverted. Its fair meaning is, that such a war-ship, by the usage of nations, is as fully exempt from the jurisdiction of the local

* In the "Statement of Opinion on the Question of International Obligations," by Sir R. Phillimore, Mr. M. Bernard, and Sir H. S. Maine," which is annexed to the Report (Blue Book, p. xxxviii), the matter is thus summed up:—"As between State and State, the right which every naval commander in foreign waters has hitherto believed himself to possess of saying, 'My ship is the castle of my sovereign under my command; no one enters it, and no force can be exerted in it, unless by my permission; and for the orders I give here I am not amenable to any foreign jurisdiction,' appears to us to be sustained by usage and opinion, and, we may add, by convenience. The privilege of the ship is the privilege of the Power whose flag she displays, and in whose service she is employed."

I should have adoped these words textually, if I had not wished to avoid all usage of metaphorical language. The term "my sovereign's castle," though its real meaning seems obvious enough, might be represented as implying pretensions to absolute and exclusive territoriality, like the pretensions imputed to those who have called the war-ship in foreign waters "exterritorial."

† See 'Letters by Historicus,' p. 201. Sir G. Cornewall Lewis, in his work on the Extradition of Criminals (p. 10), shows a similar laudable caution in "dropping all metaphor."

The nuisance of metaphorical writing on forensic subjects must have been felt by all students of the great publicists of the Roman-Dutch school. The benefit to be derived from the sound principles and profound erudition of those jurists is continually clogged and impaired by their unfortunate fondness for poetical metaphors and recondite phrases.

authorities as she would have been if actually out of their territory. When so understood the metaphor is correct enough; but when it is strained into an implication that the war-ship, though in foreign territorial waters, is to be regarded absolutely and exclusively as a material part of the land of its own sovereign, consequences are deducible from such a meaning which may well be denounced as monstrous, and as self-evident absurdities. It is on hypotheses framed on the metaphor thus exaggerated and overworked, that many of the seemingly weightiest arguments are based, which have been employed during the recent discussion by those who would narrow down the privileges of the war-ship to no more than France claims for her merchant-vessels in foreign ports. They put imaginary cases of residents within the State, in the port of which the foreign public ship is lying, committing murders on board of the ship, or escaping on board of her after murdering some one on shore; and they ask if it is not unreasonable to hold that such murderers could not be tried and punished by the courts of their own sovereign; which would be the result (saving the operation of special statutes) of holding that the foreign war-ship is for all purposes part of the exclusive territory of her own State, inasmuch as by general principle crimes are regarded as local, and cognizable and punishable exclusively in the country where they are committed*. But when the matter is regarded not as a case of "exterritoriality" in the more than literal sense of the word, but as a case of privilege, all these difficulties, that have been raised against the full allowance of the immunities hitherto generally supposed to belong to war-ships, vanish at once out of existence. Privilege may always be waived by the person for whose benefit it was introduced: "*Unusquisque potest renuntiare juri pro se nato*"—a maxim quoted by the Lord Chief Justice in his judgment in the Geneva Arbitration as to a State waiving the enforcement of some of its most important rights with regard to other States†. We are not bound to suppose that the commander of a British man-of-war would refuse his sanction to the local authorities dealing with the long-shore murderer, who was found red-handed, or with the long-shore thief who was found *hond-habend* and *back-barend* on

* Several of the leading authorities are referred to by Sir G. C. Lewis at p. 7 of his Treatise on Extradition.

† Blue Book, North America, No. 2 (1873), p. 154.

board of the ship in their harbour. If he were to do so, it is not to be assumed that his conduct would be sanctioned by his sovereign. And, if we must suppose both these improbabilites to occur, the State, within whose territory the crime had been committed, would be entitled to forbid our public ships to enter its territorial waters until reparation had been made for the gross moral wrong of which our Government would have been guilty.

I have already quoted the words of Sir Robert Phillimore, Mr. Mountague Bernard, and Sir Henry Maine, which declare that, as to immunity from local jurisdiction, "the privilege of the ship is the privilege of the Power whose flag she displays and in whose service she is employed."

This mode of viewing the matter gets rid also of other supposed cases of embarrassment which have been suggested. Thus it has been asked whether a fugitive can sue the captain, who has sanctioned his being taken away from a British ship of war. The answer is obvious, that the Naval officer, acting in behalf of his sovereign, to whom alone he is responsible, has merely declined to enforce that sovereign's exclusive privilege.

There are two broad facts which it seems impossible to reconcile with the theory that the privileges of a man-of-war in foreign waters as to jurisdiction extend to nothing beyond "matters relating to the management and discipline of the ship, and the relation of the officers and crew to one another." The first of these is the fact that the commanders of such vessels are not bound to deliver up political refugees, who have obtained access to their ships, however clear it may be that such refugees have committed acts which are criminal offences according to the local law, and however vehemently the local authorities may seek to enforce the law of the land against them. Certainly an exception may be found here and there in the writings of modern jurists to the recognition of the general principle that political refugees are not to be surrendered*; but the infinite preponderance of authority is in favour of it. The most eminent of the members of this Royal Commission who support the supremacy of the local law admits that "a general

* Professor Mohl is referred to by Sir G. Cornewall Lewis (p. 47) as denying that this doctrine is positive European International Law. But Sir Cornewall adds his own far more weighty opinion, that "it is a principle which the Governments of States sufficiently powerful to defy dictation have acted and will con-

understanding prevails that political refugees should not be given up if they can succeed in taking refuge on board a ship of war of another nation," words to which can be added the passage of the Report of the Commission itself, that "the obligation of International Law may be held to be the result of the common understanding of nations as evidenced by their practice"*. I believe that the language of Lord Palmerston was not more eloquent than true, when, in his State-paper respecting the Hungarian refugees in 1851, he averred that, "If there is one rule which more than another has been observed in modern times by all independent States, both great and small, of the civilized world, it is the rule not to deliver up political refugees, unless the State is bound to do so by the positive stipulations of a treaty; and her Majesty's Government believe that such treaty engagements are few, if indeed any such exist. The laws of hospitality, the dictates of humanity, the general feelings of mankind, forbid such surrenders; and any independent Government, which of its own free will were to make such a surrender, would be deservedly and universally stigmatized as degraded and dishonoured"†.

No distinction is made as to the protection to be given to those who reach British land and those who reach a British man-of-war. As is observed in the memorandum by Sir R. Phillimore, Mr. M. Bernard, and Sir H. S. Maine, "That there is no unqualified obligation to assist or permit on board a ship of war the enforcement of the local law is assumed in the instructions which British naval officers receive with regard to political refugees, and has been assumed in the cases where, before the issue of those instructions, the refusal to give up a refugee has been approved by the British Government"‡.

The second broad fact to which I refer as seemingly conclusive against the theory that every kind of authority of the local law may be exercised, and every kind of process of the local courts may be executed, on board of a foreign ship against the commander's will,

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tinue to act upon, not only in all cases where their political and religious sympathies are concerned, but even upon the principles of general humanity."

The principle is treated as established International Law by Wheaton, 'Elements,' part ii. chap. 2. § 13. page 140; by Heffter, page 130; by Bluntschli, page 232, § 396; by Woolsey, page 129, § 79.

* Page vii. † Cited by Sir G. C. Lewis, p. 47. ‡ Page xxv.

except in matters of internal naval discipline, is the fact that no such act of local authority has ever been performed. Sir R. Phillimore, Mr. M. Bernard, and Sir Henry Maine attest this strong negative fact; and they openly appeal to it as part of the foundation of their important opinion on the question of International obligation. They say, with special reference to the last half century, "we do not know of an instance within this period in which a right has been conceded or asserted to take a person or thing from on board a ship of war by legal process without leave of the officer in command, or to hold the officer, or any of those under his command, personally amenable to the local jurisdiction for acts done on board in contravention of a local law. Nor are we aware that this state of things has produced any practical inconvenience"*.

All that can be fairly brought forward on the other side, consists of extracts from the treatises of three Jurists (Lampredi, Azuni, and Pinheiro Fernando), and of two State-papers of very dissimilar importance. One is an opinion delivered by the American Attorney-General, Mr. Bradford, in 1794, to his Government, that a Habeas Corpus might be issued by the local court, and served on board an English ship in a harbour of the United States; the other is an opinion of Lord Stowell (then Sir William Scott), given in 1820 in answer to a minute by Lord Melville (then First Lord of the Admiralty). I pass over Mr. Bradford's opinion, which was never acted on, and in which he admits that such a usage of the writ of Habeas Corpus would be unprecedented. But every *dictum* of Lord Stowell's, though extra-judicial, deserves respectful consideration. It appears that in 1819 an Englishman, John Brown, who had commanded a vessel of the insurgent colonists, was a prisoner at Lima, in a Spanish colony. He escaped to the 'Tyne,' a British ship of war, then lying in the harbour. The Spanish authorities required his surrender; but the English captain refused to give him up. He was brought to England in the 'Tyne;' and the Lords of the Admiralty, after taking the opinion of the king's advocate, permitted him to depart without restraint. Lord Stowell says as to that permission, "If my opinion had been required I would have

* Page xxvii. The case of the 'Nautilus,' set out by Mr. Rothery (p. lxxii of Blue Book), is no exception. The written consent of Captain Baynton, the commander of the British ship, was obtained by the American deputation, who went on board of her to make inquiries.

coincided with what has been advised and done." These are important words, because, if the Spanish authorities had clearly the legal right to enforce their laws against Brown on board the 'Tyne,' the captain of that ship committed a wrong in opposing their will, and the British Government ought to have redressed that wrong by giving Brown up to the Spanish Government. Lord Stowell proceeds as follows:—"A more extensive and important question is proposed to me, viz. whether any British subject coming on board His Majesty's ships of war in a foreign port, escaping from civil or criminal process in such port, and from the jurisdiction of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the kingdom of Great Britain and Ireland. Upon this question, proposed *generally*, I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own."

It will be observed that the doctrine which Lord Stowell thus controverts, is the doctrine of "exterritoriality" in the exaggerated and erroneous form which I have spoken of in the early part of this note. He denies that the fugitive has any privilege in the matter; and, as has been explained, the privilege is that of the Sovereign only to whom the war-ship belongs. Unquestionably there are expressions in Lord Stowell's opinion which go much further. He says that Brown's case may have been an exceptional one; but he certainly states that, considering Brown to have acted unlawfully in serving with rebels against a power in amity with Great Britain, "I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the British vessel." On this we may remark that Lord Stowell wrote these words in 1820: but International Law has made great progress during the last half century, especially as to political refugees; and John Brown appears to have been a political offender only against Spanish law, even if he could be considered to be a criminal of any kind*. No English captain would now refuse shelter to

* This is now abundantly proved by the additional papers on the subject contained in the lately published Appendix to the Report, p. 224.

such a suppliant; no English minister and no English court would now hold that such shelter ought to have been denied*.

So far as regards the immensely preponderating opinions of publicists in favour of the amplest extent of the privileges of ships of war, I refer here to what has been written in the text†. The copious list of authorities there given was taken from the judgment delivered in the Geneva Arbitration by the Lord Chief Justice‡. A full list is also given in a note to the statement of opinion on International Law by Sir R. Phillimore, Mr. M. Bernard, and Sir H. S. Maine, which has been so often referred to. Those eminent jurists say of the immunity of ships of war that "A long succession of writers, English, French, German, and American, referring to this immunity as established by usage and general consent, have described it as an exemption from the 'law,' the 'jurisdiction,' or the 'law and jurisdiction' of the foreign State, or by other equivalent phrases—language which, though leaving somewhat to argument and inference, has nevertheless a plain and natural meaning"§.

An attempt is now made to pare down the authority of the full and expressive language in which Wheaton has stated the war-ship's

* The passages cited by Mr. Rothery from Baron de Cussy and Bluntschli (Blue Book, p. lxxvii) appear to me not to touch the point. Sir R. Phillimore's opinion is clearly shown by his statement in the proceedings of this very Commission.

† Chapter viii. page 177 *et seqq.*

‡ Blue Book, North America, No. 2 (1873), page 149 *et seq.* See also same Blue Book, page 219, for the observations of the Lord Chief Justice on the refusal of Captain Waddell, of the Confederate cruiser 'The Shenandoah,' to allow a warrant issued by a local magistrate to be executed on board of his ship in Melbourne Harbour. The Lord Chief Justice's comment is as follows:—

"The position taken by Captain Waddell, that a ship of war of another nation is not subject to local jurisdiction, is undoubtedly true. Upon a request of Sir C. Darling to be informed as to the propriety of executing a warrant under the Foreign Enlistment Act on board a Confederate ship of war, the Law Officers of the Crown, on being consulted, advised as follows:—

"'It appears to us that, in the circumstances stated, his Excellency the Governor acted with propriety and discretion; and there does not appear to us at present to be a necessity for any action on the part of Her Majesty's Government.

"'With respect to his Excellency's request that he may receive instructions as to the propriety of executing any warrant under the Foreign Enlistment Act on board a Confederate (public) ship of war, we are of opinion that, in a case of

privileges, of that in which they were declared by C. J. Marshall in the case of the 'Exchange,' and of that in which they were formulated by the American Government in the State-papers issued in consequence of the 'Sitka' case in 1854. It is said that these general propositions are to be applied to cases solely in which the facts are exactly analogous with the *subjecta materies* which moved Wheaton to write, or that which induced the ruling statesmen and legal officers of the United States to declare their opinions. No doubt when we are considering how far the judgment of a municipal Court is conclusive on an inferior Court, and nearly conclusive on a coordinate Court of the same State, this narrowing down of the broad language of a judgment to the strictly *subjecta materies* may be very necessary; but this is not the case in measuring the degree of respect with which enunciations of principles are to be received by those who are under no arbitrary tie of submission to them, but who weigh them according to the intellectual dignity and official or professional eminence of their promulgators. It may be safely left to any unprejudiced person to read the passage referred to in Wheaton, and to read the judgment in the 'Exchange' case, and the Sitka Manifesto*, and then to say whether these were not

strong suspicion, he ought to request the permission of the Commander of the ship to execute the warrant; and that, if this request be refused, he ought not to attempt to enforce the execution: but that in this case the Commander should be desired to leave the port as speedily as possible, and should be informed that he will not be re-admitted into it.'

"There can be no doubt as to the soundness of this advice. While a ship of war is thus exempt from local jurisdiction, the right of the local authority to withhold the accommodation of the port is equally undoubted; and the exercise of this power, applied here in the first instance, might no doubt have been prolonged."

* It is set out by Wheaton and others, and will be found at full length in Sir Travers Twiss, p. 453. He says of the propositions declared in it, that they "accord with the practice of the European powers." See particularly proposition 5.

It is not immaterial to observe that, in the argument as to the Alabama claims &c. at Geneva, the American advocates (whose interest it was to narrow down the privileges of war-ships as far as possible) treated the full immunity of public ships in a foreign harbour from all local process as notorious and unquestionable. See *passim*, "The argument at Geneva," a collection of the Forensic discussions before the tribunal of Arbitration, published by authority of the United States Government. For special example I will refer to the very able and singularly temperate "Supplemental Argument of Mr. Evarts." It contains these words:—

designed to be (what they certainly have been commonly considered to be) full expositions of International Law on the whole subject of a war-ship's privileges.

A case which occurred so lately as 1867 in Paris respecting the immunities of a foreign ambassador's house, and which is reported by M. Calvo, has been cited as proving by analogy that a foreign war-ship is not exempt from local criminal process. With all due deference I must say that it does not appear to me to furnish any such proof, but that it favours very much the doctrine which I have endeavoured to advocate—the doctrine of full privilege from local process—that privilege, however, being the privilege of the foreign Sovereign, and not of the fugitive. In that case a Russian obtained entrance to the Russian ambassador's house in Paris, and while there stabbed three persons. The ambassador was absent; but his chief secretary, who was present, called in the French police, and the offender was taken into custody by them, and proceeded against according to French law. While the process was pending, the Russian ambassador protested against its continuance, and demanded that the culprit should be given up to him. The French authorities refused to do this, and alleged as a reason for their refusal the fact that the Russian embassy had waived their privilege by calling in the local authorities. The Russian Government finally admitted the competence of the French tribunal, and the offender was tried, sentenced, and punished by French law*.

"The public ship of a nation, received into the waters or ports of another nation, is, by the practice of nations, as a concession to the sovereign's dignity, exempt from the jurisdiction of the courts, and all judicial process of the nation whose waters it visits" ("The Argument at Geneva," page 451).

* The principle that the immunity of an ambassador's house and of a foreign war-ship from local process is a matter of privilege, and not a metamorphosis of the house or vessel into actual part and parcel of a distant land, is strengthened by what M. Calvo has written as to the probable origin of the privilege as to ambassadors:—"Le principe qui en forme la base était déjà, sous plusieurs rapports, reconnu dans l'antiquité. Chez les Romains, la loi accordait aux députés de certaines provinces et de certaines villes le droit connu sous le nom de '*jus domum revocandi*,' c'est-à-dire le droit de récuser pendant leur séjour à Rome la compétence des tribunaux, tant en matière civile qu'en matière pénale, pour dettes ou pour délits antérieurs.

"Le mot d'*exterritorialité* est une expression toute moderne, qui ne se trouve pas dans les anciens auteurs" (tome i. p. 648). These privileges of the provincial *legati* are spoken of in the Digest, L. 5, c. 1. sec. 2.

But, after all, the main, the irresistible fact, which bars the establishment of the new doctrine that the process of local courts can be made to operate *in invitum* on board of foreign war-ships in the local harbours, is the fact that it never has been done. I have already cited the words of the Report of this Commission, which state that "the obligations of International Law may be held to be the result of the common understanding of nations as evidenced by their practice;" and this argument from practice applies negatively as well as affirmatively. It cannot be said that this is a thing which never has been done because no one has ever wished to do it. There must have been innumerable instances, in which the animosity of people against people, the desire of humiliating a haughty rival and of establishing a national reputation for strength and energy, the bickerings of persons in authority, the arrogance of naval officers, the pretentious pomposity of local magistrates, and the cupidity of local traders would have caused such process to be executed, if it had not been generally known and acknowledged to be unlawful. It never has been done; and we may safely believe that it never will be.

We will therefore consider it to be clear that where a fugitive slave is received on board a British man-of-war within the territorial waters of a State, the law of which sanctions slavery, there is no positive law by which the commanding officer is bound to give him up. Is there any moral obligation on the war-ship's commander to do so? In other words, does the position of the fugitive slave most resemble that of the political refugee, whom it would be ineffably base to surrender? or does it most resemble that of the foul murderer, or the heinous robber, who has by some means obtained access to the British war-ship, but as to whom no right-minded man in command of such a ship would insist on national privileges so as to bar the course of justice?

It is needless to frame a formal answer to such a question, or to accumulate words in order to intensify the abhorrence with which slavery and all things connected with it are now regarded by civilized mankind.

The Circular Instructions as to fugitive slaves last issued by the British Government (which supersede all others) appear fully to recognize the principle that the fugitive is not to be surrendered in deference to any local law about slavery. The first clause lays

down the general rule to be followed by our naval officers in these emphatic words:—"*In any case,* in which you have received a fugitive slave into your ship, and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender on the ground of slavery"*. I do not think that this is limited by the instructions in paragraph 2, as to how naval officers should act as to receiving slaves, or that the word "receive" in the first paragraph is to be enervated by requiring that it shall be powerless where there has been no *animus recipiendi.* The word in the first paragraph is (I believe) to be taken in its broad natural sense, denoting the fact of receipt, without reference to the volition of the receiver, just as it does in the common phrase, that a man has received an injury†.

The caution in the latter part of the instructions may properly be understood as directing our naval officers to avoid the commission of any act towards creating a breach of the local law: this is a widely different matter from refusing to act in enforcement of the local law.

This is the spirit of Sir George Campbell's admirable reasons for the opinion given by him separately as one of the Royal Commissioners on the Fugitive Slave question:—"The time has come when this country may fairly say we will under no circumstances aid in the enforcement of slavery, we will have nothing to do with this nefarious and accursed thing"‡.

Let it always be remembered that the institution of slavery is contrary to the first principles of general public law, as taught by the greatest founders and expounders of jurisprudence. I refer to the maxims of the great masters of the Golden Age of Roman Law, that slavery is contrary to Natural Law; that by Natural

* The "taking under the protection of the British flag" is a consequence of the "receiving."

† If necessary, we can call in aid here the great jural maxims as to the interpretation of ambiguous phrases: "Semper in dubiis benigniora præferenda sunt" (Gaius apud Dig. iv. 17, 56); "Quoties dubia interpretatio libertatis est, secundum libertatem respondendum erit" (Pomponius, *ibid.* sect. 20); "Libertas inæstimabilis res est" (Paulus, *ibid.* sect. 106); "Libertas omnibus rebus favorabilior est" (Gaius, *ibid.* sect. 122).

‡ Blue Book, p. xix.

Law all men are free and equal, but that slavery was introduced as a general institution by the practice of nations*. Slavery existed for the reason given by Grotius for the temporary existence of much International Law, "*quia placuit gentibus*"†. But now we may say with honest pride that "*displicet gentibus.*" We may not be justified in using penal or coercive measures towards the miserable minority that yet adhere to it; but we are fully justified in declining to be their bailiffs or accomplices. The evidence collected by this Royal Commission shows conclusively the strong, the growing sentiments of civilized States that slavery is no longer to be upheld or enforced; that when the slave gains access to a free country "the air makes free"‡, and that the public ships of civilized nations will not give back the fugitive slave, who once has gained the shelter of the free flag, to punishment or to bondage §.

There is no need to prepare new forms of reply if demands for the surrender of such fugitives should again be made. We may appeal to and may adopt the noble words of our old sea-hero, Lord St. Vincent, when the Lords of the Admiralty in 1798 forwarded to him the complaints of some foreign slave-owners, whose slaves had obtained refuge on board of British men-of-war in the port of Malta, which then was foreign territory. Lord St. Vincent told the British Admiralty, "that from the days of the renowned Blake to this hour it has been the pride and glory of the officers of His Majesty's navy to give freedom to slaves wherever they carried the British flag; and God forbid that such a Divine maxim should fade under me"‖.

* See these maxims quoted and commented on in the eighth chapter, page 265, *suprà*.

† See page 77, *suprà*.

‡ See the old French cases cited in note to page 262, *suprà*. See in the Appendix to Blue Book, pp. 108, 111, 112, 139, that France retains this maxim, and that it is avowed also by Prussia, Italy, Sweden, and Norway.

§ Portugal and Holland appear to be the sole exceptions. See Blue Book, p. viii, and the very valuable additional evidence now published in the Appendix, pp. 84–143. I will quote here only the emphatic answer as to the United States:—"At present no officer in command of a United-States vessel of war would give up a slave who had taken refuge on board of his ship, unless assured that he would not return to a condition of slavery" (Blue Book, p. 143).

‖ See "Correspondence as to complaint by Sovereign Order of Malta, that on several occasions Her Majesty's ships had given shelter to Fugitive Slaves," published in Blue Book, Appendix, p. 224.

No. II.

Lord Palmerston on International Arbitration.

(See page 398 of text.)

Lord Palmerston in 1848, in a letter to Lord John Russell, suggested an agreement between this country and the United States not to begin hostilities in any case of difference between them unless they should first have had recourse to the mediation or arbitration* of some friendly Power. His biographer, Mr. Ashley, adds that "as to this arbitration question, he [Lord Palmerston] would in practice have tempered theory with prudence." "In a debate in 1849 he spoke (I might almost say prophetically) of the disadvantages which England would probably have to encounter before such international tribunals. It was on the 12th of June, on a motion of Mr. Cobden's, Lord Palmerston combated vigorously the proposition that we should in any way pledge ourselves to submit to the arbitrament of a third party. He said:—'I confess that I consider that it would be a very dangerous course for this country to take, because there is no country which from its political and commercial circumstances, from its maritime interests, and from its colonial possessions, excites more anxious and jealous feelings in different quarters than England does; and there is no country that would find it more difficult to obtain really disinterested and impartial arbitrators. There is also no country that would be more likely than England to suffer in its important commercial interests from submitting the case to arbiters not disinterested, not impartial, and not acting with a due sense of their responsibility'"†.

* In the original letter the words appear to have been written *sic* (mediation / arbitration), as if inviting a consideration of which course would be best. There is a very important difference in such cases between "mediation" and "arbitration": see page 392, *suprà*.

† H. E. Ashley's 'Memoirs of Lord Palmerston,' vol. i. p. 58.

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THE END.

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